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No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HEMMERT SHIPPING CORPORATION,
HEMMERT INTERNATIONAL CORPORATION,
AND TEXAS CHARTERING, INC.,
Petitioners,

v.

FURNESS WITHY (CHARTERING) PANAMA, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH DAWSON CHEAVENS
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1250

Counsel of Record
for Petitioners

Of Counsel:

BAKER & BOTTS
LILLIAN M. FLURRY
AMY R. RICHMOND
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
ALEX F. LANKFORD, III
BLANE H. CRUTCHFIELD
Post Office Box 123
Mobile, Alabama 36601

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QUESTION PRESENTED

Under maritime law, is a showing of bad faith required in order to recover for the conversion of property wrongfully seized by maritime attachment?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Hemmert Shipping Corporation, Hemmert International Corporation, and Texas Chartering, Inc. (collectively "Hemmert/Texas") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on September 2, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 854 F.2d 410 and is reprinted as Appendix A hereto. The decision of that court in the first appeal in this case, reported at 772 F.2d 802, is reprinted as Appendix E.

The memorandum opinions and judgments of the United States District Court for the Southern District of Alabama (Cox, D.J.) have not been reported. They are reprinted as Appendices B, C, D, F, and G.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h), the respondent Furness Withy (Chartering) Panama, Inc. ("FW") brought suits in August 1981 in the Southern District of Alabama and Southern District of Georgia against World Energy Systems Associates, Inc. and WESA, Inc. (collectively "WESA"). Based on FW's counsel's affidavits that WESA could not be found within either district, writs of attachment were issued in Atlanta against a letter of credit of which WESA was the beneficiary and in Mobile arresting coal which FW alleged was owned by WESA. These writs were issued pursuant to Rule B, Supplemental Rules for Certain Admiralty and Maritime Claims, which at that time authorized writs to issue solely in reliance on the complainant's affidavit, without any judicial scrutiny. Petitioners Hemmert/Texas, owners of the coal and assignees of the letter of credit, immediately moved to dissolve those attachments. FW joined petitioners Hemmert/Texas as additional defendants in the lawsuits, and Hemmert/Texas brought various counterclaims against FW and cross-claims against WESA. The Georgia action was transferred to the Southern District of Alabama and the two actions were consolidated.

After a trial on the merits, the Southern District of Alabama entered judgment on October 26, 1984, in favor of Hemmert/Texas, holding, *inter alia*, that the attachments were improper (C.L. 26-27, 29-35).[1] F.W. appealed that decision to the Eleventh Circuit. On September 30, 1985, the Eleventh Circuit entered a judgment and opinion affirming in part, reversing in part, and remanding the case to the district court for further proceedings on the issue of Hemmert/Texas' counterclaim against FW for conversion in connection with the attachments. *Furness Withy (Chartering), Inc., Panama* v. *World Energy*

[1] References to the findings of fact and conclusions of law from the Mobile district court memorandum opinion dated October 26, 1984, are cited as "F.F. ___" and "C.L. ___." The memorandum opinion is reprinted as Appendix F hereto.

Systems Associates, Inc., 772 F.2d 802 (11th Cir. 1985) (Appendix E).

On remand, the district court entered a memorandum opinion denying Hemmert/Texas the right to recover from FW on the claim for conversion, and a second memorandum opinion disposing of Hemmert/Texas' remaining claims.

On Hemmert/Texas' appeal to the Eleventh Circuit, that Court entered a judgment and opinion on September 2, 1988, affirming the district court's judgment denying Hemmert/Texas recovery on its claims of conversion. *Furness Withy (Chartering), Inc., Panama* v. *World Energy Systems Associates, Inc.*, 854 F.2d 410 (11th Cir. 1988) (Appendix A). Under the Eleventh Circuit's interpretation of maritime law, conversion in the context of judicial attachment requires a finding of bad faith. That holding conflicts with the decisions in *Goodpasture, Inc.* v. *M/V POLLUX*, 602 F.2d 84 (5th Cir. 1979), and *Koch Fuels, Inc.* v. *13,000 Barrels of No. 2 Fuel Oil*, 704 F.2d 1038 (8th Cir. 1983).

No petition for rehearing was sought. The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule B(1), Supplemental Rules for Certain Admiralty and Maritime Claims, 28 U.S.C. app.—Rules of Civil Procedure (1982), as it existed in 1981, is reprinted as Appendix H. The current version of Rule B(1) is reprinted as Appendix I.

STATEMENT OF THE CASE

The issue in this case is whether under the general maritime law a showing of bad faith is required in order to recover for the conversion of property wrongfully seized by maritime attachment. The courts of appeals for the Fifth and Eighth Circuits have previously held that damages for conversion are recoverable even without a finding of bad faith. In direct contravention of those

courts, the Eleventh Circuit in this case has denied recovery for conversion absent a finding of bad faith. In reaching its decision, the court relied not on the decisions on conversion reached by other courts of appeals, but looked instead to lower court decisions dealing with wrongful attachments and the attendant abuse of judicial process. The consequence of the Eleventh Circuit's decision is that, notwithstanding the district court's finding that the attachments were improper, the Texas/Hemmert entities have been left without remedy for the conversion of their property.

A. Statement of Facts.

The simple issue presented by this case is embedded in a complicated factual context created when, as the Eleventh Circuit said on the first appeal, "an inexperienced seller of coal . . . was under binding contract with two different companies to ship coal from Mobile to Taiwan." 772 F.2d at 804.

The inexperienced seller of coal was Dr. Paul Liu, principal of WESA, who, in May 1981, had secured a substantial contract to sell coal to a buyer in Taiwan (F.F. 4). WESA was to be paid for the coal through a letter of credit negotiable at the Citizens & Southern National Bank in Atlanta upon presentation of various instruments including bills of lading. *Id.* WESA began to arrange to purchase the coal and transport it to Mobile for export (F.F. 13). WESA entered into a contract of affreightment ("COA") with respondent FW on June 30, 1981, to transport the first two cargoes of coal from Mobile to Taiwan (F.F. 7, 8).

To meet its contractual carriage commitment, FW chartered the CONTINENTAL CHARTERER on July 10, 1981, which it duly nominated for the first shipment (F.F. 8, 9). At that time, the CONTINENTAL CHARTERER was on a voyage to the United States with a cargo of steel to be discharged at various Gulf ports, including Mobile and New Orleans (F.F. 10). The vessel was expected to arrive at Mobile for loading the coal on August 4. FW's plan was for the CONTINENTAL CHARTERER to return to Mobile after discharging steel in New

Orleans (F.F. 10). The COA provided that if she was not ready to load cargo on August 10, WESA had the right to cancel (F.F. 8, 10).

Meanwhile, WESA was having difficulty arranging financing to purchase the coal. WESA turned to FW for financing, but FW declined to participate in that phase of the transaction (F.F. 12, 22, 23). WESA then began negotiations with Hemmert/Texas, which led to those entities' agreement to provide financing for WESA (F.F. 23).

During the month of July and into early August 1981, the charter market declined so that the price that WESA had agreed upon with FW became increasingly disadvantageous to WESA. In early August, WESA learned that the CONTINENTAL CHARTERER was unlikely to meet the agreed-upon August 10 cancelling date in Mobile, since the vessel had fallen seriously behind in its discharging schedule (F.F. 16-19, 23). Seeing a potential contractual excuse for cancelling the unattractive CONTINENTAL CHARTERER COA, WESA discussed with Hemmert/Texas the possibility of those entities' supplying an alternate vessel at a cheaper price, giving Hemmert/Texas the opportunity for further profit in the transaction (F.F. 25). Believing that it would be physically impossible for the CONTINENTAL CHARTERER to complete the discharge of the Mobile cargo, sail to New Orleans and discharge cargo there, and return to Mobile by August 10 (F.F. 17), on August 6, Hemmert/Texas chartered the EDCO from her owners, and in turn subchartered the vessel to WESA for carriage of the coal to Taiwan (F.F. 25, 29).

Under the final agreement between Hemmert/Texas and WESA, Hemmert/Texas advanced to WESA $500,000 (later $600,000) to purchase the coal and agreed to charter the EDCO to WESA as a substitute vessel for the CONTINENTAL CHARTERER at a lower rate (F.F. 26, 29). As security for the loan, WESA agreed to give Hemmert/Texas assignments from the proceeds of the letter of credit and power of attorney over the proceeds (F.F. 26). Hemmert/Texas also retained all documents

of title to the coal, including barge bills of lading and warehouse receipts.

The owners of the CONTINENTAL CHARTERER, suspecting that WESA would exercise its contractual right to cancel the CONTINENTAL CHARTERER if she were not ready to load coal in Mobile on August 10, arranged for the CONTINENTAL CHARTERER to remain in Mobile over the weekend of August 8-9 and discharge the New Orleans-bound cargo there so that she could, if there were no delays in discharging the cargo, meet the August 10 deadline (F.F. 19, 20).

Thus, by August 6, WESA had contracted with both FW and Hemmert/Texas to carry the same cargo of coal to Taiwan aboard two vessels, the CONTINENTAL CHARTERER and the EDCO. Whether WESA would be excused from its contractual commitment to FW's CONTINENTAL CHARTERER depended upon whether that vessel could complete discharging operations in Mobile over the weekend and present timely notice of readiness to take the coal (F.F. 11). Discharge operations proceeded uninterrupted by any rainstorms, so that the CONTINENTAL CHARTERER was able to complete discharge of her cargo at 7:25 p.m. on Sunday, August 9. The next morning she shifted berths in Mobile, stopping her engines at WESA's designated coal berth at 9:10 a.m., August 10. At 9:55 a.m. on that morning, WESA repudiated the COA, contending that the CONTINENTAL CHARTERER was not in fact ready to load coal (F.F. 32).

FW immediately protested WESA's cancellation of the charter, contending that WESA had wrongfully repudiated the COA and demanding arbitration under the COA.[2] WESA was now confronted with two parties having ships in Mobile claiming a right to carry the coal to Taiwan. The barges with the coal aboard

[2] As described below, that issue was ultimately submitted to arbitration. The factual dispute concerning whether the CONTINENTAL CHARTERER was in fact ready to receive coal at the appointed hour in Mobile was resolved in FW's favor against WESA (F.F. 32).

were in route to Mobile down the Warrior-Tombigbee River system.

Hemmert/Texas had the superior strategic position, because it held legal title to the coal and the barge bills of lading. Moreover, Hemmert/Texas had secured valid assignments of the letter of credit in Atlanta through which WESA would be paid by the Taiwanese buyer. FW, by contrast, had neglected to obtain any form of security in its contractual dealings with WESA. Thus, FW was merely an unsecured potential creditor of WESA. Appreciating that WESA had no financial substance whatsoever (F.F. 6, 43), FW resorted to the courts to attempt to acquire the security for its claims that it had not obtained contractually.

B. Course of Proceedings and Disposition in the Court Below.

Because of WESA's cancellation of the charter, FW demanded arbitration under the charter party and, on August 13 and 14, 1981, filed successive attachment proceedings pursuant to Rule B, Supplemental Rules for Certain Admiralty and Maritime Claims, against the coal in the Southern District of Alabama, Mobile Division, and against the letter of credit in the Northern District of Georgia, Atlanta Division, alleging that WESA was not present in the jurisdictions[3] (R. 29-31, 907-08).[4] The federal district

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[3] Maritime attachments pursuant to Rule B are designed to obtain *in personam* jurisdiction of the defendant through his property. The process is issued in order to compel the appearance of a party to the action and also assures satisfaction of a judgment in the event the suit is successful. *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 691 (1950). Although the writ may be used to satisfy a judgment, it may not be used solely for the purpose of acquiring security, because security cannot be obtained except as an adjunct to obtaining jurisdiction. *Chilean Line, Inc.* v. *United States*, 344 F.2d 757, 760 (2d Cir. 1965). FW had no maritime lien on the coal or any other *in rem* rights to the coal; its only claims were *in personam* breach of contract claims against WESA. If FW had had a maritime lien against the coal, the proper judicial course would have been to file an *in rem* action against the property pursuant to Rule C of the Supplemental Rules.

[4] References to the record and transcript in the district court will be cited as "R. ___" and "Tr. ___."

courts had jurisdiction under 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h).

Prior to the arrival of any of the barges in Mobile, Hemmert/Texas' counsel in Mobile and Atlanta advised FW that Hemmert/Texas, not WESA, owned the coal, and that any effort to attach the coal or interfere with Hemmert/Texas' rights under the letter of credit would be wrongful and in bad faith (R. 69, 960). Hemmert/Texas filed a complaint in intervention in Mobile and a counterclaim in Atlanta asserting claims against FW for wrongful attachment, conversion and tortious interference with business relations (R. 152-55, 976-77). FW amended its complaints in the Mobile and Atlanta actions, adding Hemmert/Texas as defendant (R. 34, 919). FW brought claims for fraud and breach of contract against WESA, and for tortious interference with contract against Hemmert/Texas.

Hemmert/Texas and WESA promptly moved to quash the writs of attachment on several grounds: (1) that Hemmert/Texas was the owner of the coal and the assignee of the letter of credit; (2) that WESA was present in the district; (3) that no Rule B jurisdictional attachment was necessary because the defendants had entered general appearances in the district; (4) that because FW had no maritime lien, it had sought to accomplish indirectly through Rule B(1) what it could not do directly; and (5) that the letter of credit was not properly subject to attachment (R. 104-06, 131-37, 953-72). Hemmert/Texas' Mobile motions were denied, however (R. 122, 131, 144), and notwithstanding the direct proof that Hemmert/Texas, not WESA, owned the coal (Hemmert Ex. 26 at 20-25;[5] C.L. 33), FW continued to seize the barges as they arrived, execute writs against the coal, and oppose Hemmert/Texas' motions to obtain a release of the coal (FW Ex. 89; FW Ex. 101; Hemmert Ex. 26). On August 18, 1981, the Atlanta court entered an order vacating the attachment of the letter of credit without prejudice

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[5] References to the exhibits in the trial in the district court will be cited by the offering party's name, *e.g.*, "Hemmert Ex. ___".

to any action in any other district, but only if, among other things, $210,000 of the proceeds from the letter of credit was posted as security for FW's claims against WESA (F.F. 45).

Under these circumstances, the international transaction was in a state of gridlock. Hemmert/Texas' coal was effectively being held hostage by FW as security for FW's claims against WESA. Both the EDCO and CONTINENTAL CHARTERER, incurring demurrage costs daily, were berthed in Mobile ready to carry the coal. The letter of credit would expire unless the coal were released from judicial arrest and loaded aboard ship and bills of lading issued and presented to the Bank as required by the letter of credit.

On August 21, 1981, with Texas Chartering facing overnight bankruptcy (Tr. 918) and Hemmert in serious financial difficulty if something were not done to release the coal so that it could be loaded on the EDCO and the letter of credit proceeds drawn upon, the parties entered into a stipulation agreement to cut the gordian knot. The agreement was made "without prejudice and the parties reserve[d] all of their rights and claims" (C.L. 37). In exchange for the release of the attachments of the coal and letter of credit, FW demanded that $390,000 of the proceeds from the letter of credit be placed in the registry of the Mobile court as security for all of FW's claims against WESA. The Atlanta court's order requiring $210,000 in security was also made a part of the stipulation for release. Because FW retained possession of the EDCO bills of lading pending these assignments of the letter of credit proceeds, Hemmert/Texas was forced to agree to release its rights to the letter of credit.

Hemmert/Texas thus effectively financed WESA's posting of security for FW's claims against WESA for breach of the COA and effectively paid the charges necessary to permit the loading of the coal aboard the EDCO. Hemmert/Texas' only alternative was to watch the sale collapse because of FW's attachments.

Once the coal was loaded aboard the EDCO and the negotiating documents released, $600,000 of the letter of credit proceeds

was posted as security for FW's claims in the two actions, and the remainder was disbursed to pay stevedoring, freight, and other expenses (F.F. 36).

On October 7, 1981, the Atlanta and Mobile actions were consolidated in Mobile, including all bonds and funds posted as security (R. 1166-73). Hemmert/Texas made repeated attempts to have its rights to the coal and the letter of credit determined by the court. The court, however, granted FW's motion to stay the action pending arbitration in New York between FW and WESA on FW's claims regarding cancellation of the COA (R. 247). The arbitrators ultimately found that WESA had breached the COA and awarded FW the sum of $1,254,982.30. That award was confirmed by the district court (R. 572-73).

Because of its success on its arbitration claims against WESA, FW was permitted to withdraw all the funds posted as security for those claims (R. 514-31). Hemmert/Texas vigorously opposed this withdrawal, since it was clear that none of the funds on deposit had been posted by WESA, but, instead, were funds due under the letter of credit to Hemmert/Texas (R. 562-65, 973-75; Tr. 1087, 1138). Hemmert/Texas' motion was denied (R. 569-71), but FW did post a bond in the amount of $800,000 as security for Hemmert/Texas' counterclaims (R. 287-89), which was the only security remaining to Hemmert/Texas.

After a seven-day trial in April 1983, the district court in October 1984 made findings of fact and conclusions of law and entered judgment providing, among other things, that: (1) Hemmert/Texas was entitled to judgment against WESA in the amount of $606,621.53, plus interest and attorneys' fees; (2) Hemmert/Texas was not liable to FW for tortious interference with contractual relations (C.L. 3-9) or as joint venturers with WESA (C.L. 19-21); (3) although FW's attachments of the letter of credit in Atlanta and coal in Mobile were improper (C.L. 26-35), Hemmert/Texas could not recover on its counterclaim against FW for wrongful attachment in the absence of bad faith or malice (C.L. 36); and (4) since Hemmert/Texas was the legal owner of the coal and the assignee of the letter of credit, the sum

of $603,732.26, plus interest, was to be distributed to Hemmert/Texas from the counter-security bond posted by FW.

Thus, although Hemmert/Texas lost on its damage claim for wrongful attachment, it was effectively made whole by the initial judgment. The district court said:

> In this action the bond posted by Furness Withy can be said to fairly represent the property attached. Texas and Hemmert are due to have their property returned to them, and are due to have their costs. Since the property is no longer before the court, Texas and Hemmert are entitled to recover an equivalent amount plus expenses necessarily incurred by reason of the issuance of the writs. In other words, the parties should be placed in a position they would have been in had the writs been dissolved immediately after they were entered.

(C.L. 38).

FW appealed and, on September 30, 1985, the Eleventh Circuit entered its opinion affirming the district court's findings that Hemmert/Texas was not liable to FW. The court, however, reversed the district court's decision to distribute the proceeds of FW's bond, because the trial court had not found Hemmert/Texas entitled to recover on its counterclaim for wrongful attachment. Since the district court had not reached the merits of Hemmert/Texas' conversion claim, however, the Eleventh Circuit remanded the case for determination of that claim. *Furness Withy (Chartering) Inc., Panama* v. *World Energy Systems Associates, Inc.*, 772 F.2d 802 (11th Cir. 1985).

In its memorandum opinion of May 7, 1986, the district court held that Hemmert/Texas could not recover on its claims of conversion because of the court's previous finding that FW had acted in good faith in seeking the issuance of the writs of attachment (R. Tab 162).[6]

On May 16, 1986, Hemmert/Texas filed a motion to amend that order (R. Tab 164), and on April 3, 1987, the district court

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[6] "Tab" references are unpaginated portions of the record found in Volume IV of the district court record.

entered an additional memorandum opinion and order denying Hemmert/Texas' claims for tortious interference, negligence, and equitable relief (R. Tab 170). On April 22, 1987, Hemmert/Texas filed its notice of appeal from the final judgment of the district court (R. Tab 173).

The Eleventh Circuit entered its judgment and issued its opinion on September 2, 1988. It held that Hemmert/Texas could not recover on its counterclaim for conversion because there was no finding that FW had acted in bad faith. *Furness Withy (Chartering), Inc., Panama* v. *World Energy Systems Associates, Inc.*, 854 F.2d 410 (11th Cir. 1988) (Appendix A). The court's opinion relies on cases involving wrongful attachment and improperly attempts to distinguish the prior decision of the Fifth Circuit that bad faith is not a prerequisite to recovery under a claim of conversion. It is from that opinion that Hemmert/Texas seeks writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

There is a conflict among the circuits.

This court has long recognized the fundamental principle that maritime law throughout the country must be harmonious and uniform. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 401-402 (1970); *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 215-16 (1917); *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1874).[7] Because a conflict among the circuits has been created by the Eleventh Circuit's opinion in this case, the fundamental

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[7] Justice Story, before his appointment to the Supreme Court, established the breadth of the federal courts' admiralty jurisdiction created by Article III, Section 2 of the Constitution, in *DeLovio* v. *Boit*, 7 Fed. Cas. 418 (C.C. Mass. 1815). His recognition of the uniformity of maritime law predicated his desire for uniformity in commercial law as expressed in *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). *See* discussion in Stevens, *Erie R.R.* v. *Tompkins and the Uniform General Maritime Law*, 64 Harv. L. Rev. 246 (1950).

principle of uniformity in maritime law will be eviscerated unless this Court reviews that decision.

A. Fifth Circuit.

In *Goodpasture, Inc.* v. *M/V POLLUX*, 602 F.2d 84 (5th Cir. 1979), the Fifth Circuit specifically held that there is a maritime tort of conversion, embodying the same elements as at common law, which permits recovery for wrongful use of maritime process. In *Goodpasture*, the carrier asserted a maritime lien against a cargo of grain that had been loaded aboard its vessel. In order to regain possession of its grain, the cargo owner had to post substantial security demanded by the carrier. After finding that the vessel owner improperly attached the cargo, the court stated:

> We think these actions by [the carrier] were sufficiently at variance with the right to possession of the wheat by its owner, Goodpasture, to constitute conversion, which we have defined in a landside context as "the unlawful and wrongful exercise of dominion, ownership or control over the property of another, to the exclusion of the same rights by the owner."

602 F.2d at 87, *citing Bankers Life Insurance Co.* v. *Scurlock Oil Co.*, 447 F.2d 997, 1004 (5th Cir. 1971), and *Norris* v. *Bovina*, 492 F.2d 502 (5th Cir. 1974). In *Goodpasture*, there was no express finding of bad faith.

In holding that the maritime tort of conversion has the same elements as the tort in its "landside context," the Fifth Circuit relied on the Second Circuit's opinion in *The LYDIA*, 1 F.2d 18 (2d Cir. 1924). There, the Second Circuit held that an *in rem* admiralty suit for conversion was appropriate because it was a tort committed on navigable waters. *Id.* at 23. The Second Circuit did not directly address the elements of the maritime tort of conversion because the primary issue in *The LYDIA* was the ownership of the coal.[8]

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[8] Ownership of the coal and letter of credit is no longer an issue in the present case. The district court held that Hemmert/Texas owned the coal that was attached (C.L. 31-33), and that Hemmert/Texas had been assigned proceeds in the letter of credit and had both the power of attorney to negotiate it and the right to take possession (F.F. 26, 50).

In the present case, the Eleventh Circuit summarily dismissed *Goodpasture* in a footnote that reveals an appalling misreading of that case. *Furness Withy*, 854 F.2d at 412 n.6. The Eleventh Circuit first stated that in *Goodpasture*, "the Fifth Circuit held that a vessel became liable for conversion to the owner of a cargo of wheat *when it left the port without issuing the owner a bill of lading.*" *Id.* (emphasis added). These were clearly *not* the facts of *Goodpasture*, however. In *Goodpasture*, the Fifth Circuit pointed out that "POLLUX *did not sail but merely asserted a claim in the nature of a maritime lien* against the wheat." *Goodpasture*, 602 F.2d at 87 (emphasis added). The Eleventh Circuit appears to have confused the facts of *Goodpasture* with the facts of *The LYDIA*, discussed above, which the Fifth Circuit had used as a starting point for its analysis in *Goodpasture*. In *The LYDIA*, the ship *did* sail away after asserting a charter party lien against the cargo.

Second, the Eleventh Circuit attempted to distinguish *Goodpasture* by noting that it "did not involve the conversion of property by wrongful attachment, the situation presented here." Once again, the Eleventh Circuit has misunderstood the facts of *Goodpasture*. The Fifth Circuit opinion expressly recites the use of judicial processes to effect the attachment: "Thereafter, Negocios . . . asserted certain counterclaims against the grain on board the POLLUX." 602 F.2d at 86. The Fifth Circuit stated the issue in that case as follows: "It remains to be considered whether the seizure of Goodpasture's wheat by Negocios as security for its claims against Empac was a maritime tort. . . ." *Id.* at 87.

Goodpasture and the Eleventh Circuit's contrary opinion in this case cannot be reconciled. In *Goodpasture*, like in the present case, there were three parties involved, each with different interests and rights. Goodpasture contracted to sell a large quantity of wheat to Empac Grain Corporation, Inc. Payment to Goodpasture, like payment from WESA to Hemmert/Texas, was to be through a letter of credit against documents, including freight prepaid bills of lading. Empac entered into a time charter party

with Negocios del Mar for Negocios' ship, the POLLUX, to carry the grain, similar to WESA's contract with FW for the CONTINENTAL CHARTERER. In *Goodpasture*, the grain had been loaded onto the M/V POLLUX when Negocios elected to assert a claim of a maritime lien against the cargo.[9] Negocios first informed both Empac and Goodpasture that it would not issue freight prepaid bills of lading until it received payment for the proposed voyage and costs. After Goodpasture sued the vessel alleging a conversion, Negocios filed a claim of owner to the POLLUX, asserted counterclaims against Goodpasture, and arrested the grain on board the POLLUX. *Id.* at 86.

In *Goodpasture*, Negocios already *had* possession of the cargo at the time that it asserted its maritime lien. It had no need to resort to the courts initially, but did so after Goodpasture sued the vessel. In the present case, FW did not have the cargo; it was in the possession of a third party, the barge carrier. FW was therefore required to use judicial process to achieve its ends. Merely because circumstances dictated that FW use judicial process initially rather than self-help does not change the fact that Hemmert/Texas was wrongfully deprived of its property by FW's actions. Goodpasture, like Hemmert/Texas here, recovered its attached property seized by judicial process only by posting a substantial bond.

The net effect of the two procedures in *Goodpasture* and in the present case was the same: the claims by Negocios and FW were "asserted with the intent to hold" Goodpasture's wheat and Hemmert/Texas' coal "hostage against" Empac's and WESA's "time charter arrears. . . ." *Id.* at 87. FW, like Negocios, deprived Hemmert/Texas, the rightful owner of the cargo, of its ownership rights in the only manner available to it. As stated by the district court in this case, "Texas and Hemmert are due to have their property returned to them. . . ." (C.L. 38). Since the Eleventh Circuit did not even understand the facts of *Goodpas-*

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[9] Because FW did not have possession of the coal, it had no maritime lien. *See* note 4 above.

ture, it is not surprising that it failed to understand or follow the Fifth Circuit's holding.

B. Eighth Circuit.

The Eighth Circuit has also held that there is a maritime tort of conversion that does not require a finding of bad faith. *Koch Fuels, Inc.* v. *Cargo of 13,000 Barrels of No. 2 Fuel Oil*, 530 F. Supp. 1074 (E.D. Mo. 1981), *aff'd*, 704 F.2d 1038 (8th Cir. 1983). In *Koch*, Inland Oil & Transport Company, a barge line, had refused to deliver to Koch possession of the oil that was on Inland's barge until it was paid. The district court concluded that Inland had wrongfully converted the oil. 530 F. Supp. at 1081. Citing *Goodpasture*, the district court held that a maritime cause of action for conversion is established when a party shows the following:

(1) an unauthorized and wrongful assumption of control, dominion, or ownership by a person over the personalty of another;

(2) his right to the property;

(3) his right to the immediate possession of the property, absolute and unconditional; and

(4) a demand for possession thereof.

Id. at 1080.

The court permitted Koch to recover its actual damages, but did not permit recovery of punitive damages because it concluded that Inland's acts were not sufficiently willful, wanton, malicious, or reckless. *Id.* at 1083. Thus, in the Eighth Circuit, like in the Fifth Circuit, bad faith is not required for one to recover under the maritime tort of conversion.

C. Eleventh Circuit.

Even within the Eleventh Circuit itself, the two panels' holdings in the two appeals of this case are inconsistent.[10] In its September 30, 1985 opinion, the first Eleventh Circuit panel remanded the case for a determination of Hemmert/Texas' counterclaim against FW for conversion of the coal, because the district court had not decided the conversion counterclaim. 772 F.2d at 809. That panel expressed no opinion as to the validity of the conversion counterclaim or the appropriate amount of damages if the court found in favor of Hemmert/Texas. In that same opinion, the panel affirmed the district court's holding that, because it found FW had acted acted in bad faith, Hemmert/Texas was not entitled to any damages for wrongful attachment. *Id.* at 808. The remand was a tacit endorsement of the *Goodpasture* rule that bad faith is not necessary for conversion.

Nevertheless, on the subsequent appeal from remand, another Eleventh Circuit panel summarily dismissed the same conversion claim that had been remanded. The second panel held that, since wrongful attachment requires a finding of bad faith and the damages sought by Hemmert/Texas were allegedly the same for both the wrongful attachment and conversion theories, a finding of bad faith was required in order for Hemmert/Texas to recover damages in conversion as well.

In the present case, like in *Goodpasture*, the issue is not FW's malicious use of the legal system, but is instead FW's interference with Hemmert/Texas' property: the seventeen bargeloads of coal and Hemmert/Texas' interest in the letter of credit. Hemmert/Texas should therefore be entitled to recover damages for the interference with its property under the maritime tort of conversion recognized by the Fifth Circuit in *Goodpasture*, by the

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[10] The Eleventh Circuit had previously recognized the two causes of action for wrongful attachment and conversion as separate torts. *See Armada Coal Export, Inc.* v. *Interbulk, Ltd.*, 726 F.2d 1566 (11th Cir. 1984) (holding that Armada's two tort claims for wrongful attachment and conversion were proper issues for the judiciary rather than matters for arbitration under the terms of the charter party).

Eighth Circuit in *Koch*, and implicitly by the Eleventh Circuit's first opinion in this litigation.

II.

Bad faith is not required at common law for conversion by judicial process.

"Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963). In discharging this responsibility, it is appropriate for this Court to look to the predominant jurisprudence in the United States. *See, e.g., Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974) (reviewing wrongful death statutes and their interpretation for purposes of determining maritime wrongful death damages). While admiralty courts must make their own decisions, they should do so "with an awareness of other courts' solutions to similar problems, sensitive to whether a 'significant policy' of the state within whose territorial waters the injury occurred 'would be frustrated by such an application.' " *Lewis* v. *Timco, Inc.*, 716 F.2d 1425, 1427 (5th Cir. 1983), *citing Watz* v. *Zapata Offshore Co.*, 431 F.2d 100, 113 (5th Cir. 1970).

Federal courts may borrow from a variety of sources in establishing the general maritime law, including "traditional common law rules." *East River Steamship Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986). The Eleventh Circuit, in the first appeal of the present case, recognized that it was proper for the district court to look to the Restatement of Torts for guidance in resolving issues of maritime law. 772 F.2d at 807 n.5. It is therefore appropriate and necessary that this Court follow the established common law jurisprudence that a separate tort for conversion exists, even when that conversion results from abuse of the legal processes, and that the tort does not require a showing of bad faith.

The leading commentary on tort law recognizes that unlike actions for wrongful attachment or abuse of judicial process,

malice or bad faith is *not* required in an action for simple conversion.

> The remedy for unjustified litigation imposes, at least theoretically, a heavy burden on the plaintiff to show malice and a want of probable cause; but there are other grounds for recovery in certain cases that impose no such burden. *An attachment or garnishment of property believed to belong to a debtor but in fact belonging to another, may operate as a simple conversion of that property, so that the owner may recover for the attachment without proof of termination, malice or probable cause.* In such a case, the gist of the tort of conversion is an interference with the property, not a misuse of the legal system, and the restrictions imposed in a malicious prosecution action are withdrawn.

W. Prosser, *The Law of Torts* § 120 at 896 (5th ed. 1984) (emphasis added).

Basic legal encyclopedias have long recognized that the tort of conversion exists when legal process is used to deprive another of his property:

> A *wrongful seizure* or sale of property *under legal process constitutes a conversion.* Such a conversion may be predicated upon the seizure or sale of property exempt by law, or *of property of one person under legal process directed against another* . . . .

18 Am. Jur. 2d *Conversion* § 31 (1985) (emphasis added).

> An action for conversion may be maintained for a wrongful seizure and disposition of property under an attachment, execution, or writ of replevin, such as the taking of property by virtue of a void writ or the seizure of exempt property *or property belonging to a person other than the one against whom the process ran.*

89 C.J.S. *Trover & Conversion* § 40 at 5496 (1955) (emphasis added). Case law in the states is in accord. *See, e.g., Woodring* v. *Jennings State Bank*, 603 F. Supp. 1060 (D. Neb. 1985); *Byrne* v. *Frank Cunningham Stores, Inc.*, 89 F. Supp. 489 (D.D.C. 1950); *Scott* v. *Doggett*, 226 S.W.2d 183 (Tex. Civ. App. — Amarillo 1949, writ ref'd n.r.e.); *Lundgren* v. *Western State Bank*, 189

Minn. 476, 250 N.W. 1 (1933); *Toomer* v. *Fourth National Bank*, 67 So. 225 (Fla. 1915); *Mattingly* v. *Houston*, 52 So. 78 (Ala. 1909); *Dyett* v. *Hyman*, 129 N.Y. 351, 29 N.E. 261 (1891); W. Prosser, *The Law of Torts* § 15 at 84 (4th ed. 1971).

Thus, the essence of the tort of conversion is interference with the property of another, regardless of the motive, intention, or state of mind of the interfering party.

> The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action.

Moore v. *Regents of California*, 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494, 503 (1988) (citations omitted).

The tort of wrongful attachment embodies the concept of bad faith or malicious use of the legal system. Conversion, by contrast, may be committed with the best of intentions. Either tort, however, may exist where the judicial system is used to take possession of another's property. *See Sprague* v. *Allied Mills, Inc.*, 129 Neb. 394, 261 N.W. 892 (1935) (creditor and warehouseman liable for garnishing and selling wife's separately owned property to satisfy husband's debt); *Lundgren* v. *Western State Bank*, 189 Minn. 476, 250 N.W. 1 (1933) (party directing sheriff to seize property and refusing to release it guilty of conversion); *Gilbert* v. *Rothe*, 106 Neb. 549, 184 N.W. 119 (1921) (judgment creditor of husband who ratified sheriff's wrongful levy on wife's separate property is liable as trespasser); *Crouter* v. *United Adjusters, Inc.*, 259 Or. 348, 485 P.2d 1208 (1971) (distinguishing conversion and wrongful attachment); *Dyett* v. *Hyman*, 129 N.Y. 351, 29 N.E. 261 (1891) (creditors liable for trespass when wrongfully attached property that debtor had assigned to third party).

Two recent state court opinions illustrate the distinction between conversion and abuse of judicial process. In *Keys* v.

Chrysler Credit Corp., 303 Md. 397, 494 A.2d 200 (Md. App. 1985), defendant had wrongfully garnished plaintiff's wages after plaintiff had paid the entire outstanding balance of a judgment against him. The plaintiff brought suit alleging defamation, malicious use of process, abuse of process, and conversion. Although the trial court had denied recovery under the theory of conversion because it believed that conversion was a "direct offshoot and outflow of the legal proceedings that have a privilege," 494 A.2d at 208, the court of appeals disagreed, holding that a privilege did not attach to protect a party or attorney sued for trespass or conversion as a result of damage caused by the intentional issue of an attachment upon a previously paid judgment.[11]

Instead, the court held that, "conversion is an independent tort, and is not subsumed within the tort of malicious use of process. . . . Conversion is an intentional tort, but the intent that must be shown does not necessarily involve an improper motive." *Id.* The court concluded, "thus, if Appellant is able to prove a conversion she will be entitled to appropriate damages, even though the jury may fail to find an improper motive necessary to sustain an action for malicious use of process." *Id.*

Similarly, in *Homac, Inc.* v. *Fort Wayne Mortgage*, 577 F. Supp. 1065 (N.D. Ga. 1983), the court held that the defendant

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[11] Hemmert/Texas does recognize that the use of the judicial process is privileged in many instances, and that this protection afforded those who bring their claims to court is necessary to ensure that courtrooms are used to their full effect. The privilege, however, is not without its limits:

> A general privilege applies to an attachment issued upon a judgment regularly entered by a court of competent jurisdiction, even though the judgment may be later set aside or reversed because of error on the part of the judge. *However, where the court is without jurisdiction to enter judgment, or the proceedings are entirely void, or property other than that of the judgment debtor is seized, there is no privilege.*

Keys, 494 A.2d at 208 (emphasis added). *See also* 18 Am. Jur. 2d *Conversion* § 31 (1985) and 89 C.J.S. *Trover & Conversion*, § 40 at 5496 (1955) (noting that the privilege does not apply when the property attached belongs to a third party).

should recover from the plaintiff under its counterclaim for conversion. In that case, the plaintiff had sought to enjoin the defendant from repossessing a mobile home. The court found that the plaintiff converted the defendant's property when it denied the defendant's right to repossess the mobile home and stated that any attempt at repossession would be met with resistance. The court noted that, "a conversion is 'the unauthorized assumption and exercise of the right of ownership over personal property belonging to another which is contrary to the owner's right,' " and that "[i]t is immaterial that the wrongful dominion over another's property is exercised in good faith without knowledge of the true owner's title." *Id.* at 1071, *citing Swish Manufacturing Southeast* v. *Manhattan Fire & Marine Insurance Co.*, 675 F.2d 1218, 1219 (11th Cir. 1982), and *Lovinger* v. *Hix Green Buick Co.*, 110 Ga. App. 698, 140 S.E.2d 83 (1964).

By holding that a claimant must prove bad faith in order to recover for a conversion caused by wrongful attachment, the Eleventh Circuit has improperly fused the elements of two independent torts — wrongful attachment and conversion. In grafting the element of bad faith onto the conversion cause of action, the Eleventh Circuit relied solely upon wrongful attachment cases and read between the lines of those cases to find support for its holding: "In our view maritime precedent has answered, *albeit implicitly*, [that] . . . [t]he claimant must prove bad faith by the party who obtained the attachment." 854 F.2d at 412 (emphasis added). The Eleventh Circuit thus discarded the separate tort of conversion in a wrongful attachment setting, based upon decisions that did not even consider the tort of conversion because it had not been raised.[12] This conclusion is contrary to long-established

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[12] The Eleventh Circuit cites a number of cases for the "established principle of maritime law" that one who suffers a wrongful attachment may recover damages only if he proves that the attaching party acted in bad faith. 854 F.2d at 411, *citing Frontera Fruit Co.* v. *Dowling*, 91 F.2d 293, 297 (5th Cir. 1937); *Incas & Monterey Printing & Packaging, Ltd.* v. *M/V SANG JIN*, 747 F.2d 958, 964 (5th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985); *Ocean Ship Supply, Ltd.* v. *M/V LEAH*, 729 F.2d 971, 974 (4th Cir. 1984); *John W. Stone Oil Distrib.*,

law where claimants have recovered for conversion when the judicial process has been wrongfully used.

III.

Bad faith should not be required in maritime law.

As the ultimate arbiter of the general maritime law of the United States, this Court has looked for guidance not only to principles developed by common law courts but also to principles of basic fairness implicit in our legal system. *See, e.g., Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 588 (1974) ("Our decision [that damages are recoverable for loss of society in maritime wrongful death actions] is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who injured within its jurisdiction.") "Admiralty law is judge-made law to a great extent." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979). "The Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime . . . ." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). Examples of principles of maritime law created by this Court in reliance upon basic principles of fairness include recovery for wrongful death, *Morange* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), loss of society in maritime wrongful death actions, *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), and strict products liability, *East River Steamship Corp.* v. *Transamerican Delaval, Inc.*, 476 U.S. 858 (1986).

Inc. v. *M/V MISS BERN*, 663 F. Supp. 773, 778 (S.D. Ala. 1987); *Consol. Rail Corp.* v. *M/T HOEGH FORUM*, 630 F. Supp. 83, 88 (E.D. Pa. 1985); *Ships & Freights, Inc.* v. *Farr, Whitlock & Co.*, 188 F. Supp. 438, 439 (E.D.N.Y. 1960); *Applewhaite* v. *S.S. SUN-PRINCESS*, 136 F. Supp. 769, 771 (D.N.J. 1956); *Walsh Transp. Co.* v. *Iroquois Transit Corp.*, 16 F.2d 475, 476 (S.D.N.Y. 1926). In none of these cases, however, did the party seeking damages assert a conversion cause of action. In most, the theory was wrongful seizure, abuse of process, or wrongful attachment. *Consol. Rail Corp.* is a case regarding tortious interference with contract relations.

The facts of this case strikingly demonstrate the injustice of a rule that requires a showing of bad faith as a prerequisite for recovery in conversion for wrongful use of judicial process. Hemmert/Texas' valuable proprietary interest in the coal and the letter of credit were appropriated by FW through judicial processes. After Hemmert/Texas' prompt efforts to dissolve the attachments were unsuccessful, it was forced to consent to post security to bail out its property from the judicial arrest wrongfully initiated by FW. Although the initial actions of the district courts in Atlanta and Mobile in refusing to dissolve the wrongful attachments were later shown to be incorrect, the courts did at least require FW to post security for the Hemmert/Texas counterclaims of wrongful attachment and conversion. Now, as stated by the district court, "Texas and Hemmert are due to have their property returned to them, and are due to have their costs" (C.L. 38). Nevertheless, because the district court found that the attachments were not done in bad faith—notwithstanding the fact that before any of the coal was seized Hemmert/Texas notified FW that it owned the coal—Hemmert/Texas has been denied any redress in this case. If that is the general maritime law, it should not be, and this Court should change it.

FW chose to do business with WESA, the party later found to be the malefactor, without obtaining any security interest to protect its contractual rights. Hemmert/Texas protected itself in its dealings with WESA by obtaining title to the coal and assignment of the letter of credit proceeds. The district court found Hemmert/Texas' interests to be superior to those of FW. By extending the bad faith requirement of wrongful attachment claims to a conversion claim, the Eleventh Circuit has permitted FW to use judicial process to accomplish what it neglected to do through private contractual arrangements, *i.e.*, to obtain security against WESA's wrongdoing. But the security FW obtained through judicial process was not from WESA; it was from Hemmert/ Texas. A rule requiring Hemmert/Texas to show bad faith on the part of FW under these circumstances is simply wrong.

This Court has zealously protected parties' property rights from prejudgment writs of seizure, finding various state prejudgment procedures to violate constitutional guarantees of due process. *See, e.g., North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). This Court's scrutiny of the fairness of prejudgment remedies should lead it to refuse to countenance a rule that allows a party to use prejudgment judicial processes to deprive an innocent third party of property rights unless there is a showing of bad faith. This Court need not hold that Admiralty Rule B violates due process rights, however.[13] It only needs to resolve the conflict in the circuits and hold, as have the Fifth and Eighth Circuits and common law courts, that bad faith is not required when judicial process is used to effect a conversion.

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[13] Rule B was amended in 1985 "to provide for judicial scrutiny before the issuance of any attachment or garnishment process . . . to eliminate doubts as to whether the Rule is consistent with the principles of procedural due process enunciated by the Supreme Court" in the cases cited above. Rule B advisory committee note. *See* Appendices H and I for the text of the Rule as utilized by FW in 1981 and as amended in 1985.

CONCLUSION

For these reasons, this petition for certiorari should be granted, and this Court should resolve the conflict among the circuits in favor of finding a maritime tort of conversion where a party's property has been wrongfully attached, without requiring a finding of bad faith.

Respectfully submitted,

JOSEPH DAWSON CHEAVENS
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1250

Counsel of Record
for Petitioners

Of Counsel:

BAKER & BOTTS
LILLIAN M. FLURRY
AMY R. RICHMOND
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
ALEX F. LANKFORD, III
BLANE H. CRUTCHFIELD
Post Office Box 123
Mobile, Alabama 36601

No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HEMMERT SHIPPING CORPORATION,
HEMMERT INTERNATIONAL CORPORATION,
AND TEXAS CHARTERING, INC.,

Petitioners,

v.

FURNESS WITHY (CHARTERING) PANAMA, INC.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH DAWSON CHEAVENS
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1250

Counsel of Record
for Petitioners

Of Counsel:

BAKER & BOTTS
LILLIAN M. FLURRY
AMY R. RICHMOND
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
ALEX F. LANKFORD, III
BLANE H. CRUTCHFIELD
Post Office Box 123
Mobile, Alabama 36601

December 1, 1988

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APPENDIX A

No. 87-7282.

United States Court of Appeals,

ELEVENTH CIRCUIT.

Sept. 2, 1988.

FURNESS WITHY (CHARTERING), INC., PANAMA,
Plaintiff-Appellee,

v.

WORLD ENERGY SYSTEMS ASSOCIATES, INC., WESA, INC.
Defendants,

HEMMERT SHIPPING CORPORATION AND
TEXAS CHARTERING, INC.
Defendants-Appellants.

Panamanian corporation, with which shipper contracted to ship coal from Alabama to Taiwan, instituted attachment proceedings against coal and letter of credit, following shipper's repudiation of contract of affreightment. The plaintiff also filed suit against second company, with which shipper entered into another contract to transport the coal, for fraud and breach of contract, and for tortious interference with contractual relations. Codefendant company responded with counterclaims and cross claims against plaintiff for wrongful attachment, conversion and tortious interference with business and property rights. The United States District Court for the Southern District of Alabama, Nos. 81-0571-C, 81-0763-C, Emmett Ripley Cox, J., held, inter alia, that the codefendant was not liable to plaintiff for tortious interference with contractual relations and that it could not recover on its counterclaim for wrongful attachment but that it was nevertheless entitled to damages. On plaintiff's appeal, the Court of Appeals, 772 F.2d 802, affirmed in part, reversed in part and remanded. On remand, the District Court held that because codefendant's claim for conversion was identical to its claim for wrongful

attachment, which had failed, codefendant could not recover for conversion. Codefendant appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that to recover for a conversion caused by an improper attachment under maritime law, codefendant had to prove that plaintiff acted in bad faith.

Affirmed.

Alex F. Lankford, III, Blane H. Crutchfield, Hand, Arendall, Bedsole, Greaves & Johnston, Mobile, Ala., for defendants-appellants.

Robert B. Fougner, Hill, Betts & Nash, New York City, for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Alabama.

Before TJOFLAT and HATCHETT, Circuit Judges, and LYNNE*, Senior District Judge.

TJOFLAT, Circuit Judge:

In *Furness Withy (Chartering), Inc.* v. *World Energy Systems Associates, Inc.*, 772 F.2d 802 (11th Cir.1985) (*Furness Withy I*) , we remanded this case to the district court for the disposition of the claim of Hemmert Shipping Corporation/Texas Chartering, Inc. (Hemmert) that Furness Withy converted Hemmert's property when it wrongfully attached such property pursuant to Admiralty Rule B(1).[1] The district court had already held

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*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

[1] Rule B(1) of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty & Maritime Claims (Admiralty Rule B(1)), pursuant to which Furness Withy attached Hemmert's property, provided:

> With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the

against Hemmert on Hemmert's claim for wrongful attachment, concluding that Furness Withy had acted in good faith in seeking the attachment.[2] We affirmed this holding in *Furness Withy I*, 772 F.2d at 808. On remand, the district court held that because Hemmert's claim for conversion is identical to its claim for wrongful attachment — which had failed — Hemmert could not recover for conversion. Hemmert now appeals that ruling.[3]

At the outset, we observe that the damages Hemmert sought to recover under its alternative claims for wrongful attachment and conversion are the same. Hemmert wants to be compensated for the loss of use of its property for the period during which it was under attachment.

It is an established principle of maritime law that one who suffers a wrongful attachment may recover damages from the party who obtained the attachment, provided he prove that such party acted in bad faith. *See, e.g., Consolidated Rail Corp.* v. *M/T Hoegh Forum*, 630 F.Supp. 83, 88 (E.D.Pa.1985) (in personam attachment); *Ships & Freights, Inc.* v. *Farr, Whitlock &*

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defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to [Fed.R.Civ.P.] 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for [Admiralty] Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

[2] As *Furness Withy I* indicates, two attachments were involved. We treat them as one attachment in this opinion.

[3] Hemmert also appeals from dispositions the district court made with respect to other claims made by Hemmert against Furness Withy. The district court made these dispositions prior to the appeal in *Furness Withy I*, and we did not remand them, along with the conversion claim, for further consideration. Because they were not included in the mandate in *Furness Withy I*, the district court properly refused to reconsider them.

Co., 188 F.Supp. 438, 439 (E.D.N.Y.1960) (same); *Applewhaite* v. *S.S. Sunprincess*, 136 F.Supp. 769, 771 (D.N.J.1956) (same); *Walsh Transp. Co.* v. *Iroquois Transit Corp.*, 16 F.2d 475, 476 (S.D.N.Y.1926) (same); *see also Frontera Fruit Co.* v. *Dowling*, 91 F.2d 293, 297 (5th Cir.1937) (in rem attachment);[4] *Incas & Monterey Printing & Packaging, Ltd.* v. *M/V Sang Jin*, 747 F.2d 958, 964 (5th Cir.1984) (same), *cert. denied*, 471 U.S. 1117, 105 S.Ct. 2361, 86 L.Ed.2d 261 (1985); *Ocean Ship Supply, Ltd.* v. *M/V Leah*, 729 F.2d 971, 974 (4th Cir.1984) (same); *John W. Stone Oil Distrib., Inc.* v. *M/V Miss Bern*, 663 F.Supp. 773, 778 (S.D.Ala.1987) (same). We recognized this principle in *Furness Withy I*, 772 F.2d at 808, when we held that Hemmert could not recover for wrongful attachment because it failed to show that Furness Withy had acted in bad faith.[5]

Hemmert points out that the cases involving wrongful attachment have not explicitly addressed the question whether the common law tort of conversion, which does not contain the element of bad faith, provides a remedy in the context presented here. Hemmert invites us to draw on the common law of conversion to award the damages it seeks. We decline the invitation. In our view, maritime precedent has answered, albeit implicitly, the question of what a claimant must prove to recover for a conversion caused by an improper attachment. The claim-

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[4] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[5] Admiralty Rule B(1), *see supra* note 1, does not alter this principle. The Admiralty Rules and their predecessors — the 1844 Rules for Practice for Admiralty & Maritime Cases, and the Admiralty Rules of 1920 — are a codification of existing maritime law, and should not be construed as altering that law unless they do so expressly. *See* 7A J. Moore & A. Palaez, Moore's Federal Practice ¶ B.02, at B-53 & n. 8 (2d ed. 1988); Admiralty Rule B(1) advisory committee's note; *see generally Schiffahartsgesellschaft Leonhardt & Co.* v. *A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528, 1532 (11th Cir.1985) (en banc).

ant must prove bad faith by the party who obtained the attachment.[6]

AFFIRMED.

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[6]Hemmert cites *Goodpasture, Inc.* v. *M/V Pollux,* 602 F.2d 84 (5th Cir.1979), in support of its argument that, under the facts of this case, an action for conversion lies and that it need not prove bad faith to recover. *Goodpasture,* however, is plainly inapposite. In that case, which involved an in rem proceeding, the Fifth Circuit held that a vessel became liable for conversion to the owner of a cargo of wheat when it left port without issuing the owner a bill of lading. *Goodpasture* did not involve a conversion of property by wrongful attachment, the situation presented here.

APPENDIX B

IN THE

United States District Court

FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FURNESS WITHY (CHARTERING), PANAMA, INC., *Plaintiff,* vs. WORLD ENERGY SYSTEMS ASSOCIATES, INC., *et al.*, *Defendants.*	CIVIL ACTION NO. 81-0571-C CIVIL ACTION NO. 81-0763-C

MEMORANDUM OPINION AND ORDER

These consolidated cases are before the court on the motion to amend judgment, findings of fact and conclusions of law (Doc. #164) filed by Texas Chartering and Hemmert International Corporation (Hemmert-Texas) on May 16, 1986. (The court was under the impression that this case was still pending on appeal until counsel recently called the court's attention to the file).

Hemmert-Texas asserts that this court's memorandum opinion (Doc. #104) dated October 26, 1984, and the memorandum opinion entered on remand (Doc. #162) dated May 7, 1986, do not address the merits of the tortious interference, negligence and equitable relief claims raised in the counterclaim/intervening complaint. Hemmert-Texas submits that because the Eleventh Circuit did not rule on these issues and because this court's previous opinions do not reflect its decisions on these claims, additional findings and conclusions should be entered.

Nothing has changed the court's opinion that this action was remanded for the limited purpose of having this court decide the conversion claim, and that it is not appropriate to otherwise reopen the case. It is clear that the judgment entered in this case on October 26, 1984, included an order that "all other claims in this action are DISMISSED WITH PREJUDICE on the merits." In order to preclude the necessity for another remand should the Court of Appeals decide that this court still has jurisdiction to address these claims, however, the court will enter the following additional findings and conclusions:

A. The court has previously found that Furness Withy had every reason to believe that the coal was owned by WESA at the time the writs of attachment and garnishment were issued, and that Furness Withy acted in good faith in seeking the issuance of the writs, and was not guilty of bad faith, malice or gross negligence (see Section 49 of Findings of Fact dated October 26, 1984). The court also finds that Furness Withy did not fail to exercise reasonable care in seeking issuance of the writs in question or in pursuing its judicial remedies which resulted in the arrest and detention of the coal. The court concludes, therefore, that Furness Withy is not guilty of any simple negligence which subjects it to said liability to Texas and Hemmert.

B. Based on findings of fact previously made, the court concludes that Furness Withy has no liability to Texas and Hemmert for tortious interference with the contractual relations of Texas and Hemmert with WESA. Just as Texas and Hemmert did not induce WESA to breach its contract with Furness Withy, Furness Withy did not induce WESA to breach any of its agreements with Texas and Hemmert. The fact that seizure under lawful judicial process made it impossible for WESA to proceed with performance of its agreements with Texas and Hemmert does not subject Furness Withy to liability for tortious interference with contractual relations.

C. The Texas and Hemmert claim for "equitable relief" is apparently grounded solely on the fact that Texas and Hemmert had a better claim to the coal than did Furness Withy. This fact alone does not entitle Texas and Hemmert to an award of damages under these circumstances.

D. It is ORDERED and ADJUDGED that all claims of Hemmert International Corporation and Texas Chartering, Inc. for tortious interference with contractual relations, negligence and equitable relief are DISMISSED WITH PREJUDICE ON THE MERITS.

E. To the extent that the motion to amend judgment, findings of fact and conclusions of law be construed to seek any relief not afforded by this memorandum opinion and order, it is DENIED.

DONE this 3rd day of April, 1987.

/s/ EMMETT R. COX
United States District Judge

APPENDIX C

IN THE

United States District Court

FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FURNESS WITHY (CHARTERING), PANAMA, INC., *Plaintiff,* vs. WORLD ENERGY SYSTEMS ASSOCIATES, INC.; WESA, INC.; HEMMERT SHIPPING CORPORATION; HEMMERT INTERNATIONAL CORPORATION; and TEXAS CHARTERING, INC., *Defendants.*	CIVIL ACTION NO. 81-0571-C CIVIL ACTION NO. 81-0763-C

MEMORANDUM OPINION

These consolidated cases are before the court on remand from the Court of Appeals. *Furness Withy (Chartering)* v. *World Energy Systems,* 772 F.2d 802 (11th Cir. 1985).

The Court of Appeals expressed the opinion that this court did not reach the merits of the counterclaim for conversion of the coal. This court was of the opinion that it had done so in paragraph 36 of the opinion dated October 26, 1984, under the heading "Furness Withy's Liability for Wrongful Attachment and Garnishment or Conversion."

Having found the facts in the Memorandum Opinion dated October 26, 1984, the court is of the opinion that no further findings of fact are required. The court enters the following additional conclusions of law.

1. The counterclaim for conversion of the coal can be described as a claim that there was a "judicial conversion." While the common law recognized such an action, the rule in admiralty is well established that in the absence of a showing of bad faith, malice or such negligence as amounts to bad faith, damages are not recoverable for the wrongful use of judicial process. See *Frontera Fruit Co.* v. *Dowling,* 91 F.2d 293 (5th Cir. 1937); *Ships & Freights, Inc.* v. *Farr, Whitlock & Co.,* 188 F. Supp. 438, 439 (E.D. N.Y. 1960); *Applewhaite* v. *S.S. Sunprincess,* 136 F. Supp. 769, 771 (D. N.J. 1956); and 2 C.J.S. *Admiralty,* § 156(d) (1972), at 272. Furness Withy, therefore, has no liability to Texas Chartering, Inc. ("Texas") or Hemmert Shipping Corporation or Hemmert International Corporation ("Hemmert") for conversion of the cargo of coal.

2. Texas and Hemmert also argue that the following claims asserted by them remain viable: "Tortious Interference, Negligence, Unlawful Arrest and Invocation of Equitable Remedies." The court is of the opinion that this action was remanded for the limited purpose of having this court decide the conversion claim, and that having done that it is not appropriate to otherwise reopen the case.

The court will by separate document enter judgment in favor of Furness Withy (Chartering) Panama, Inc. on the conversion claim.

DONE this 7th day of May, 1986.

/s/ EMMETT R. COX
United States District Judge

APPENDIX D

IN THE

United States District Court

FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FURNESS WITHY (CHARTERING), PANAMA, INC., *Plaintiff,* vs. WORLD ENERGY SYSTEMS ASSOCIATES, INC., WESA, INC.; HEMMERT SHIPPING CORPORATION; HEMMERT INTERNATIONAL CORPORATION; and TEXAS CHARTERING, INC., *Defendants.*	CIVIL ACTION NO. 81-0571-C CIVIL ACTION NO. 81-0763-C

FINAL JUDGMENT

It is ORDERED and ADJUDGED that judgment be, and hereby is, entered in favor of Furness Withy (Chartering) Panama, Inc. on the claims against it by Texas Chartering, Inc., Hemmert Shipping Corporation and Hemmert International Corporation for conversion of the cargo of coal, and that such claim be, and hereby is, DISMISSED on the merits.

Furness Withy (Chartering) Panama, Inc. is entitled to recover of the above-mentioned defendants any taxable costs incurred in these proceedings since remand from the Court of Appeals.

DONE this 7th day of May, 1986.

/s/ EMMETT R. COX
United Stated District Judge

APPENDIX E

No. 84-7742.

United States Court of Appeals,

ELEVENTH CIRCUIT.

SEPT. 30, 1985.

FURNESS WITHY (CHARTERING), INC., PANAMA,
Plaintiff-Appellant,

v.

WORLD ENERGY SYSTEMS ASSOCIATES, INC.,
WESA, INC.,
Defendants,

HEMMERT SHIPPING CORPORATION,
Defendant-Appellee.

Panamanian corporation, with which shipper contracted to ship coal from Alabama to Taiwan, instituted attachment proceedings against coal and letter of credit, following shipper's repudiation of contract of affreightment. Plaintiff also filed suit against second company, with which the shipper entered into another contract to transport the coal, for fraud and breach of contract, and for tortious interference with contractual relations. Codefendant company responded with counterclaims and cross claims against plaintiff for wrongful attachment, conversion and tortious interference with business and property rights. The United States District Court for the Southern District of Alabama, Emmett Ripley Cox, J., held, inter alia, that the codefendant was not liable to plaintiff for tortious interference with contractual relations and that it could not recover on its counterclaim, but that it was nevertheless entitled to damages for wrongful attachment. On plaintiff's appeal, the Court of Appeals, Henderson, Circuit Judge, held that: (1) the finding that codefendant did not induce shipper to breach its initial contract with plaintiff was not clearly erroneous, and court properly determined that there was no proof

of tortious interference by codefendant in the initial contract, and (2) since order which required plaintiff to post bond provided that the bond would be released if codefendant did not prevail on its counterclaim, and since court found in favor of plaintiff on the counterclaim for wrongful attachment of coal and letter of credit, court had no authority under the order to distribute the bond proceeds to codefendant.

Affirmed in part, reversed in part, and remanded for further proceedings.

Robert B. Fougner, Mark Jaffe, New York City, for Furness Withy, etc.

Alex F. Lankford, III, Mobile, Ala., for World Energy & Wesa, Inc., Hemmert Shipping & Texas Chartering.

Appeal from the United States District Court for the Southern District of Alabama.

Before VANCE and HENDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

HENDERSON, Circuit Judge:

This complicated admiralty case arises out of an unusual incident that occurred in Mobile, Alabama on August 10, 1981. On that day, an inexperienced seller of coal, who is not a party to this appeal, was under binding contract with two different companies to ship coal from Mobile to Taiwan. This appeal involves the determination of which of those two companies must sustain the loss growing out of the dual contracts.

On November 27, 1980, Dr. Paul Liu, a director of World Energy Systems Associates, Inc. (World Energy) contracted to supply 50,000 metric tons of coal to a Taiwanese company, Chia Hsin Cement Corp. (Chia Hsin). World Energy was to be compensated for the coal through a letter of credit negotiable at the Citizens & Southern Bank in Atlanta, Georgia. Before World Energy could receive the proceeds from the letter of credit, it was

required to furnish to the bank various instruments including descriptions of the coal, bills of lading and a cargo manifest.

In May, 1981, World Energy formed a subsidiary corporation under Alabama law. The district court found that this subsidiary, WESA, Inc. (WESA) was the alter ego of World Energy. This finding is not challenged by either side. In May, 1981, World Energy assigned to WESA all of its interest in the Chia Hsin coal contract. This contract is the only asset ever owned by WESA.

In June, 1981, Dr. Liu began searching for a ship to transport the coal to Taiwan. On June 30, 1981, acting on behalf of WESA, he entered into a contract with the appellant, Furness Withy (Chartering) Inc. Panama (Furness Withy), a Panamanian corporation with its principal place of business in Hong Kong. The contract of affreightment (COA) called for two shipments of coal from the United States to Taiwan at a freight rate of $36.00 per metric ton. The first shipment was to be made no later than August, 1981. The COA provided that WESA could cancel the contract if Furness Withy failed to provide an adequate vessel ready to load the coal in Mobile, Alabama by 2400 hours on August 10, 1981.

In early July, 1981, Dr. Liu turned to the problem of acquiring the coal that he had contracted to sell to Chia Hsin. He signed a contract to buy 7,500 tons of coal from Moss Port, Inc., an Alabama coal producer. He also contracted with Warrior Tombigbee Transport Company, Inc. (Warrior Tombigbee) to barge the coal down to Mobile where the coal was to be loaded upon the ship provided by Furness Withy. Because WESA still had no assets, Dr. Liu agreed to sell this coal for $100,000.00 to Wilson Financial Corp. (Wilson) which gave WESA an option to repurchase it for $109,000.00 within 30 days of the contract date. On July 14, 1981, WESA and Wilson entered into a similar repurchase agreement for an additional 5,000 metric tons of coal.

On July 17, 1981, Furness Withy nominated the M/V CONTINENTAL CHARTERER (CONTINENTAL) as the ship to

transport the coal to Taiwan. Furness Withy advised Dr. Liu that the CONTINENTAL's estimated date of arrival at Mobile was August 4, 1981. On July 22, 1981, WESA accepted the nomination.

In early August, 1981, it became apparent to all that the CONTINENTAL would not be able to load the coal until August 12, 1981 if it kept on its intended itinerary. Therefore, Furness Withy attempted to negotiate with Dr. Liu for a later cancellation date in exchange for a lower freight rate. Although Dr. Liu considered this proposal, the owners of the CONTINENTAL would not correspondingly reduce its rate to Furness Withy for the use of the ship. This refusal to lower the freight charges aborted any further effort by Furness Withy to extend the CONTINENTAL's shipping date.

On August 5, 1981, Dr. Liu learned that Furness Withy was looking for another vessel to transport the coal to Taiwan. Prior to this time, he had been negotiating with the appellees, Hemmert Shipping Corp. (HSC) and Texas Chartering, Inc. (TCI) to finance the repurchase of the coal from Wilson. Dr. Liu needed this loan because WESA had no assets or other sources of payment and Chia Hsin's letter of credit was not payable until the coal was loaded on the ship. HSC and TCI agreed to provide this financing if Dr. Liu and WESA would use one of their ships to transport the coal to Taiwan.

On August 6, 1981, WESA and HSC-TCI[1] entered into an agreement whereby HSC-TCI agreed to advance WESA $500,000.00 (later $600,000.00) and charter another ship, the EDCO, to WESA at the rate of $31.50 a ton. WESA was required to pay interest on the loan at 2% above New York prime rate. WESA also agreed to give HSC-TCI the right to charter all the vessels WESA needed for a period of 60 months. And,

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[1] HSC and TCI became joint venturers and therefore will be referred to as HSC-TCI.

WESA agreed to assign to HSC-TCI the proceeds from Chia Hsin's letter of credit as security for the loan. Dr. Liu also requested that the contract of affreightment with HSC-TCI be made subject to the valid cancellation of its COA with Furness Withy but HSC-TCI refused to accept this condition.

On the afternoon of August 6, 1981, after the new contract of affreightment with HSC-TCI was executed, the CONTINENTAL's itinerary was changed so that it could meet the August 10th deadline. This fact was communicated to Dr. Liu who, in turn, so advised an officer of HSC-TCI. Meanwhile, also on August 6, 1981, the Birmingham Trust National Bank began receiving transfers of money from HSC-TCI in trust to pay for various shipping expenses.

The next day, August 7, 1981, WESA gave HSC-TCI a power of attorney over the negotiation of the letter of credit and formally assigned over $600,000.00 of the proceeds of the letter of credit to HSC-TCI. These proceeds were to be used to reimburse HSC-TCI for the funds it advanced to purchase and transport the coal. Later, WESA assigned an additional $100,862.96 of the proceeds because of an additional loan from HSC-TCI to WESA.

The agreement between WESA and HSC-TCI contemplated that HSC-TCI would purchase all of the coal and provide for its transportation to Mobile. Consequently, HSC-TCI retained all of the documents of title and bills of lading required to negotiate Chia Hsin's letter of credit.

At 9:10 a.m. on August 10, 1981, the CONTINENTAL arrived in Mobile ready to load coal in accordance with the first shipping contract. At 9:55, WESA repudiated the Furness Withy COA by falsely claiming that the CONTINENTAL was not ready to take on the coal.

After this repudiation, Furness Withy immediately instituted attachment proceedings in the United States District Court for the Southern District of Alabama against the coal and in Atlanta

against the letter of credit. Furness Withy also filed this action in the Southern District of Alabama against World Energy and WESA for fraud and breach of contract and against HSC-TCI for tortious interference with contracual relations.[2] HSC-TCI responded with counterclaims and crossclaims against Furness Withy for wrongful attachment, conversion and tortious interference with business and property rights.[3] Pursuant to 9 U.S.C. § 8, Furness Withy reserved its right to submit to arbitration its claims for breach of contract against WESA. After a bond of $210,000.00 was posted in the United States District Court for the Northern District of Georgia by WESA and HSC-TCI, that case was transferred to the district court in the Southern District of Alabama and consolidated with the first action.

On August 14, 1981, Dr. Liu and representatives of HSC-TCI met with Furness Withy in the federal district court in Mobile but Furness Withy did not attempt to serve them with process having already set the attachments in motion. On August 17, 1981, WESA attempted to cancel the EDCO contract of affreightment but HSC-TCI rejected the cancellation.

After hearings on August 14, 17, 18 and 19, 1981, motions by HSC-TCI to vacate Furness Withy's attachments were denied by Judge Virgil Pittman of the Southern District of Alabama. Judge Pittman also directed Furness Withy to post countersecurity in the amount of $800,000.00 to

> abide by and answer the decree of the court in any final judgment, including appellate process, if any rendered in favor of Hemmert Shipping Corporation . . . on Hemmert's counterclaim, and any final judgment, including apellate process, if any, entered in favor of intervening plaintiffs Texas Chartering,

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[2] Warrior Tombigbee, which had possession of the coal at the time the attachment issued, intervened in this action claiming the attachment was unlawful. Warrior Tombigbee is not a party to this appeal.

[3] HSC-TCI's claim of tortious interference with business and property rights was not resolved by the district court and has not been argued on appeal.

> Inc. and Hemmert International Corporation .... *In the event Hemmert Shipping Corporation, Hemmert International Corporation, and Texas Chartering, Inc. do not prevail in their counter-claims, the aforesaid cash deposit will be released or the aforesaid bond cancelled as the case may be.*

See Order of August 18, 1981 at 2. (Emphasis added).

On August 21, 1981, the parties reached a stipulation whereby Furness Withy agreed to release the attachments in exchange for adequate security to cover its claims against WESA. As the security, HSC-TCI assigned $600,000.00 from the proceeds of the letter of credit. Furness Withy's $800,000.00 bond was retained by the court. All of the parties reserved their rights to arbitrate and litigate their respective causes of action.

Once the attachments were dissolved, HSC-TCI proceeded to fulfill its contract with WESA and the coal was transported on the EDCO and the letter of credit was negotiated at the bank in Atlanta. Subsequently, Furness Withy prevailed against WESA in arbitration and, pursuant to the parties' August 21, 1981 stipulation, received the $600,000.00 that HSC-TCI posted earlier as security.

After a bench trial, the district court made extensive findings of fact and concluded that (1) HSC-TCI was entitled to a judgment against WESA in the amount of $606,621.53, plus interest and attorney's fees;[4] (2) HSC-TCI was not liable to Furness Withy for tortious interference with contractual relations; and (3) HSC-TCI could not recover on its counterclaim against Furness Withy for wrongful attachment in the absence of bad faith or malice. Notwithstanding these findings, the court then awarded HSC-TCI the sum of $603,732.26, plus interest, for the wrongful attachment of the letter of credit and the coal, for the purpose of restoring HSC-TCI to the "same position they would have been

[4] WESA does not appeal from the district court judgment.

in had the writs been dissolved immediately after they were entered."

Based on these findings, the followng issues are presented on this appeal:

(1) Whether the district court applied an improper legal standard in deciding that HSC-TCI did not wrongfully interfere with Furness Withy's contractual relations;

(2) Whether the district court was clearly erroneous in finding that HSC-TCI's conduct did not consitute tortious interference with the contract;

(3) Whether the district court erroneously found that Furness Withy unlawfully attached HSC-TCI's property;

(4) Whether the district court's finding that Furness Withy did not attach HSC-TCI's property in bad faith was clearly erroneous;

(5) Whether the district court correctly awarded damages to HSC-TCI in the absence of a favorable ruling on any of its counterclaims;

(6) Whether the district court properly computed HSC-TCI's damages;

(7) Whether the district court erred in failing to consider the merits of HSC-TCI's counterclaim for conversion.

I. *Tortious Interference with Contractual Relations*

The district court held that HSC-TCI was not liable for tortious interference with the contract between Furness Withy and WESA primarily because it did not "induce" or "force" its breach. The court reached this conclusion by applying the standards set forth in § 766, Restatement (Second) of Torts (1977).[5] The court found that HSC-TCI simply engaged in

[5] This section states:

> One who intentionally and improperly interferes with the performance of a contract . . . by inducing or otherwise causing the third person not to perform the contract, is subject to liability . . . .

"business in the usual manner" and did not intentionally "cause the results which are complained of." *See* Order of October 26, 1984 at 24-25. The court concluded that there was "a complete failure of proof as to this theory of recovery against" HSC-TCI. *Id.* at 25.

Furness Withy's main argument is that the district court erroneously required Furness Withy to prove that HSC-TCI's "primary purpose" was to unlawfully interfere with the contract at issue before liability could attach. It claims that HSC-TCI knew that it was interfering with Furness Withy's contract with WESA and that such knowledge is sufficient to show the intent necessary for this particular tort. Furness Withy further urges that the district court incorrectly held that HSC-TCI did not "induce" WESA to breach its contract with Furness Withy.

Contrary to these assertions, the district court did not rule that an improper motive is a mandatory element of liability for the tort of interference with contractual relations. *Id.* The court simply stated that the absence of malice as a motivating factor was relevant in making a determination of whether HSC-TCI's interference with the contract was tortious.[6] The district court did not err in reaching this conclusion. *See* § 766 Restatement (Second) of Torts, Comments r and s (1977).

As noted earlier, the district court found that HSC-TCI did not induce WESA to breach its contract with Furness Withy. In light of the fact that there was uncertainty as to whether Furness Withy would meet the cancellation date as provided in its COA, we conclude that this finding is not clearly erroneous. Because of the absence of any such inducement and the lack of any wrongful

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The district court properly looked to the Restatement for guidance in resolving the issues raised by this maritime case. *See generally Pino* v. *Protection Maritime Ins. Co., Ltd.*, 599 F.2d 10, 14 (1st Cir.) (1979).

[6] In fact, the district court expressly stated that a defendant can be liable, if he is "substantially certain" that harm will be "produced by his conduct." *See* Order of October 26 at 23.

motive on the part of HSC-TCI, the district court's determination that there was no proof of tortious interference is affirmed.

II. *The Damages Award*

The district court awarded to HSC-TCI over $600,000.00 in damages plus interest. It reached this result despite its prior conclusion that HSC-TCI was *not* entitled to any damages on its counterclaims for wrongful attachment. The issue before us is whether this award can be sustained in view of the court's failure to rule in favor of HSC-TCI on any of its counterclaims.

Furness Withy attached the coal and letter of credit pursuant to Fed.R.Civ.P.Supp. B(1)[7] The district court found that the attachment of the coal was ineffective because HSC-TCI, not WESA, owned the coal and the attachment of the letter of credit was invalid because HSC-TCI's rights in that letter were superior to those of WESA. Furness Withy maintains that the attachment of the coal was lawful because the transaction between WESA and HSC-TCI was no more than a pledge of the goods which left WESA with an interest in the coal subject to attachment.[8] We need not reach this issue, however, because the district court found that HSC-TCI was not entitled to any damages as a result of these allegedly wrongful attachments because there was no demonstrable bad faith or malice by Furness Withy. *See Frontera Fruit Co.* v. *Dowling,* 91 F.2d 293 (5th Cir.1937); *Ships & Freights, Inc.* v. *Farr, Whitlock & Co.,* 188 F.Supp. 438, 439

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[7] This rule states in pertinent part:

(1) When Available: Complaint, Affidavit, and Process. With respect to any admiralty or maritime claim *in personam* a verified complaint may contain a prayer . . . to attach the defendant's goods and chattels or credits and effects in the hands of garnishees . . . , if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney, that, to the affiant's knowledge . . . the defendant cannot be found within the district . . . .

[8] Furness Withy does not urge that the letter of credit was validly attached.

(E.D.N.Y.1960) (plaintiff must prove bad faith in order to prevail on claims of wrongful attachment in admiralty cases). In light of this conclusion, the attachments of the coal and letter of credit cannot serve as a basis for the award of damages to HSC- TCI.

Acknowledging that it did not file a cross-appeal, HSC-TCI nevertheless contends that the district court's finding that Furness Withy did not act in bad faith was clearly erroneous. We proceed to consider this argument because a prevailing party may defend a judgment on any ground which the law and the record permit as long as it does not expand the relief granted by the court. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 fn. 8, 98 S.Ct. 364, 369 fn. 8, 54 L.Ed.2d 376, 385 fn. 8 (1977). The district court's finding, however, that Furness Withy did not act in bad faith because it reasonably believed that WESA owned the coal and the letter of credit is supported by the evidence and is not clearly erroneous.[9] Therefore, the district court properly concluded that HSC-TCI was not entitled to any damages due to the purportedly wrongful attachments.

After holding that HSC-TCI could not recover under its theory of wrongful attachment, the district court proceeded to distribute the funds that Furness Withy had deposited into the court. The court found that the $800,000.00 bond "represented" the attached property. The court then stated that because the coal and the letter of credit were no longer before the court, HSC-TCI was entitled to the value of that property plus all reasonable expenses incurred as a result of the issuance of the writs of attachment. Order of October 26, 1984 at 38. HSC-TCI was accordingly awarded the amount it advanced for the coal and letter of credit

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[9] HSC-TCI claims that Furness Withy acted in bad faith because it told Furness Withy that WESA did not own the coal or letter of credit prior to service of the attachments. This argument fails, however, because Furness Withy asked HSC-TCI for further documentation to support this contention and never received a reply.

plus expectant profits, demurrage paid on the EDCO which resulted from the delay in shipping the coal and interest.[10]

Furness Withy challenges this award of damages because HSC-TCI did not prevail on any of its counterclaims. This argument is meritorious. As pointed out earlier, the order which required Furness Withy to post the $800,000.00 provided that the bond would be released if HSC-TCI "do not prevail in their counterclaims." *See* Order of August 18, 1981 at 2. Since the district court found in favor of Furness Withy on HSC-TCI's counterclaim for wrongful attachment, the court had no authority under the terms of the order to distribute the proceeds of that bond to HSC-TCI.

HSC-TCI attempts to sustain its favorable damages judgment on the theory that the district court has broad equitable powers to insure that the proceeds of a bond are distributed so as to do "substantial justice." Assuming the existence of these "powers" in an appropriate case, we nonetheless find on the present facts that the terms of the order must control the distribution of the proceeds from the bond. Furthermore, the bond was posted pursuant to Rule E(7) of the Admiralty Rules which provides:

> *Security on Counterclaim.* Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, *any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim* unless the court, for cause shown, shall otherwise direct . . . (emphasis added).

This rule contemplates, as did the court's order, that the defendant is entitled to the proceeds of the bond only if it prevails on its

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[10] The court also subtracted $88,998.60 from the total figure because of sums that had been previously recovered by HSC-TCI.

counterclaim.[11] The district court erred in holding that Furness Withy posted the bond as a substitute for the coal and letter of credit and incorrectly entered judgment in favor of HSC-TCI on the bond.

HSC-TCI also argues that the damage award can be affirmed because it is entitled to be reimbursed by Furness Withy for the $600,000.00 that it posted to secure Furness Withy's claims against WESA. The problem with this position is that HSC-TCI *agreed* to post that bond in exchange for Furness Withy's agreement to release the attachments. It would be inequitable to now require the return of the $600,000.00 which was the basis for an agreement voluntarily entered into by HSC-TCI to assume WESA's liability for the breach of its original contract of affreightment. Furthermore, an official of HSC-TCI admitted before Judge Pittman that HSC-TCI knew when it contracted with Dr. Liu that it was assuming the risk that Furness Withy was going to meet the cancellation date. *See* Defendant's Exhibit 26 at 32. It is now too late to complain about the results of a voluntarily assumed risk.

For all of the foregoing reasons, we vacate the district court's award of damages to HSC-TCI.[12] Since the district court did not reach the merits of HSC-TCI's counterclaim against Furness

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[11] HSC-TCI points to statements made by Judge Pittman during the hearing on August 17, 1981 to support its argument that the bond was posted as a substitute for the coal. The order requiring the bond, however unambiguously, states that the proceeds thereof will be returned to Furness Withy if HSC-TCI fails in its counterclaims. HSC-TCI has cited no case law to support its theory that an unambiguous order should be interpreted differently because of statements made by the judge prior to the issuance of the written order.

[12] Because of this holding, we need not decide whether the district court correctly calculated HSC-TCI's damages. We note, however, that the district court's decision to award HSC-TCI the value of the coal is puzzling in light of the fact that the coal was released to HSC-TCI and later sold to the Taiwan purchaser.

Withy for conversion of the coal,[13] it is necessary to remand the case for a determination of that cause of action. *See generally, Baker* v. *Bell,* 630 F.2d 1046, 1055 (11th Cir.1980). We express no opinion as to the validity of that counterclaim or the appropriate amount of damages should the court find in favor of HSC-TCI.

AFFIRMED in part, REVERSED in part and REMANDED for proceedings consistent with this opinion.

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[13] Although HSC-TCI's brief is vague on this point, it claimed at oral argument that the district court never decided the conversion counterclaim. Our review of the district court's final order leads us to the same conclusion.

APPENDIX F

IN THE

United States District Court

FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FURNESS WITHY (CHARTERING), PANAMA, INC.,
Plaintiff,

vs.

WORLD ENERGY SYSTEMS ASSOCIATES, INC., WESA, INC.; HEMMERT SHIPPING CORPORATION; HEMMERT INTERNATIONAL CORPORATION; and TEXAS CHARTERING, INC.,
Defendants.

CIVIL ACTION NO. 81-0571-C
CIVIL ACTION NO. 81-0763-C

MEMORANDUM OPINION

This is a case which arose as a result of a dispute arising out of shipments of coal from Mobile, Alabama to Taiwan. The basic problem in this extremely complicated action is that there was only one cargo and two vessels chartered to carry it.

The matter came on for trial before the court without a jury. Having considered the evidence and arguments of counsel, the court enters this memorandum opinion.

FINDINGS OF FACT

1. The plaintiff, Furness Withy (Chartering) Panama, Inc. (hereinafter "Furness Withy") is a Panamanian corporation with its principal place of business in Hong Kong and is in the business of trans-oceanic carriage of various cargoes. During all material times Furness Withy was doing busines at the offices of its agent,

Maritime Industries Agencies, Inc. (hereinafter "MIA") at New York, New York.

2. Defendant World Energy Systems Associates, Inc. (hereinafter "World Energy") is a Tennessee corporation with its principal place of business in Knoxville, Tennessee. Defendant WESA, Inc. is an Alabama corporation with its principal place of business in Knoxville, Tennessee.

3. Defendant Hemmert Shipping Corporation is a New York Corporation and intervening plaintiff-defendant Hemmert International Corporation (hereinafter collectively referred to as "Hemmert") is a New Jersey corporation. Both Hemmert corporations have their principal of business in Morris County, New Jersey. Intervening plaintiff-defendant Texas Chartering, Inc. (hereinafter "Texas") is a Texas corporation with its principal place of business in Houston, Texas.

4. In 1979 Dr. Paul Liu became a director of World Energy and began negotiations to procure certain coal supply contracts in Taiwan. On November 27, 1980 Dr. Liu, on behalf of World Energy, executed a coal supply agreement with the Chia Hsin Cement Corporation of Taiwan. Plaintiff's Exhibit 42. This contract called for the delivery of some 50,000 metric tons of coal from the United States to Taiwan. The coal was to be paid for through a letter of credit in favor of World Energy, negotiable at the Citizens and Southern National Bank of Atlanta, Georgia (hereinafter "C&S Bank"). The letter of credit was to be payable upon presentation of the following documents: (a) commercial invoices detailing the quality and unit price of the coal; (b) original bills of lading; (c) cargo manifest; (d) cargo storage plans; (e) surveyor's certificate of weight and inspection; (f) certificates of analysis; (g) sellers' cable advice relative to miscellaneous matters; and (h) statements of fact and certificates

of country of origin (these documents will be hereinafter referred to as the "negotiating documents").[1]

5. In May of 1981 World Energy decided to create an Alabama corporation, which was required in order to hold certain leases on docking facilities in Alabama. WESA was, therefore, created. *See* Plaintiff's Exhibit 41. On June 15, 1981, WESA and World Energy entered into a contract whereby World Energy would assign to WESA all of its rights and obligations in the Chia Hsin coal contract. This assignment was subsequently ratified at the August 2, 1981, board meeting of World Energy. *See* Plaintiff's Exhibit 41, at 64. The Chia Hsin contract was the only substantial asset of WESA. In December of 1981 the assignment of the Chia Hsin contract to WESA was rescinded because of this litigation. After the contract was rescinded, therefore, WESA had no assets of substance. *See* Plaintiff's Exhibit 41, at 85-86.

6. In June of 1981 Dr. Liu approached various representatives of Furness Withy and made inquiries relative to the procurement of a vessel to transport the coal to Taiwan. On July 14 Furness Withy received a Dunn & Bradstreet report on the financial condition of WESA. The report gave no rating at all and indicated that WESA's financial condition was poor at best. The report stated that WESA had cash on deposit in the "low four (4) figures." *See* Texas and Hemmert Exhibit 1. Therefore, during the negotiations between Furness Withy and Dr. Liu, Furness Withy became concerned about Dr. Liu's ability to pay for the freight. Dr. Liu proposed to give Furness Withy an assignment of the letter of credit but this proposal was rejected by Furness Withy.

7. On June 30, 1981, Furness Withy and WESA entered into a contract of affreightment (hereinafter "COA") for two shipments of coal under an Americanized Welsh Coal Charter Party.

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[1] The Chia Hsin letter of credit was negotiable for a maximum amount of $1,922,250.00. Texas and Hemmert Exhibit 11.

Plaintiff's Exhibit 1. The COA provided for two shipments from one safe berth, one safe port U. S. Gulf to Taiwan of 25,000 metric tons of coal each. The shipments were to be made aboard handisize vessels at a freight rate of $36.80 per metric ton.

8. The first shipment of coal was to be made in August of 1981 and the second shipment in September of 1981. In order to provide a vessel for the first shipment, Furness Withy chartered the M/V CONTINENTAL CHARTERER on July 10, 1981. Plaintiff's Exhibit 4. The voyage charter for the CONTINENTAL CHARTERER was on a "back-to-back" basis with the COA and provided for a freight rate of $30.60 per metric ton. Furness Withy, therefore, stood to earn $6.20 per metric ton on the first shipment of coal.

9. On July 17, 1981, MIA nominated the CONTINENTAL CHARTERER as the vessel for the August shipment. Plaintiff's Exhibit 4. At this time WESA was informed that the estimated time of arrival (ETA) for the vessel at Mobile was August 4, 1981. On July 22, 1981, WESA accepted the nomination of the vessel. Plaintiff's Exhibit 7.

10. The vessel sailed under her previous charter from Antwerp on July 9 with a cargo of steel for discharge at several U. S. Gulf ports. The vessel was originally scheduled to discharge a cargo at Mobile then proceed to New Orleans to discharge and then return to Mobile to take on the WESA cargo.

11. The COA between Furness Withy and WESA provided for a cancellation time of 24:00 hours, August 10, 1981. By the terms of the COA, WESA could cancel the contract if the vessel was not ready to load by the cancellation time.

12. In order to obtain coal for its Chia Hsin contract, WESA entered into various purchase agreements with coal producers. On July 2, 1981, WESA contracted to purchase 7,500 tons of coal from Moss Port, Inc. and then sold the coal to Wilson Financial Corporation (hereinafter "Wilson") for $100,000.00. Under its

contract with Wilson, WESA had an option to repurchase this coal for $109,000.00 within thirty (30) days of the date of the contract. *See* Plaintiff's Exhibit 46. This arrangement was essentially a financing arrangement. On July 14, 1981, WESA entered into a second contract with Wilson and Energy Group, Inc. Plaintiff's Exhibit 47. The Energy Group contract was identical to the first coal purchase agreement except for the amount. WESA purchased 5,000 tons of coal from Energy Group, sold this coal to Wilson for $55,000.00 and retained an option to repurchase for $61,000.00.

13. On July 1, 1981, WESA entered into a transportation contract with Warrior Tombigbee Transportation Co. (hereinafter "Warrior") to transport the coal on barges from Moss Port, Alabama to Mobile, Alabama. Plaintiff's Exhibit 45.

14. The locks on the Warrior and Tombigbee Rivers in Alabama were scheduled to be closed for repairs on August 15. This situation would prevent transportation along the waterway for a period of approximately thirty (30) days. Dr. Liu had two concerns relative to the closing of the locks. First, if the barges were below the locks at the time of the closing, WESA would incur additional expenses relative to the barges. On the other hand, if the barges did not pass through the locks prior to closing, WESA would then be forced to purchase coal on the Mobile market at an inflated price in order to perform its contracts. Notice to navigational interests had been published well in advance of the scheduled lock closings and all parties to this litigation were aware of it.

15. On July 21, 1981, the broker for the CONTINENTAL CHARTERER, Intercontinental Chartering, Ltd. (hereinafter "ICC"), provided Furness Withy with an ETA Mobile of August 5, 1981. Plaintiff's Exhibit 6. Furness Withy passed this information on to WESA on July 23, 1981. Plaintiff's Exhibit 8.

16. On August 4, 1981, ICC communicated to the owners of the CONTINENTAL CHARTERER, Continental Grains, Inc.,

its concerns that the vessel may not meet the cancellation date. Plaintiff's Exhibit 10. ICC requested that the vessel's schedule be expedited.

17. On August 5 MIA communicated with the agents of the CONTINENTAL CHARTERER and proposed that the vessel's freight be lowered to $27.00 in exchange for an extension of the cancellation date. The vessel counter-offered that she would lower her rate by $1.00 if she was prepared to load by August 12. *See* Texas and Hemmert Exhibit 2. At this time all parties concerned were convinced that the CONTINENTAL CHARTERER would not make the cancellation date. *See* Texas and Hemmert Exhibit 1. Indeed, if the vessel had continued to abide by her original schedule, it would have been virtually impossible to meet the August 10 date.

18. During the first days of August the plaintiff, the vessel and the vessel's agents discussed various options which might be available to expedite the vessel's schedule. One such option was transhipment of the New Orleans cargo by discharge onto a lighter at Mobile. Page and Jones, Inc., agents for the CONTINENTAL CHARTERER, discussed the transhipment option with the owners of the vessel as early as August 2 when the vessel was at Tampa, Florida. At that time, Page and Jones was instructed to compute the cost of transhipment of the New Orleans cargo. Sometime prior to August 6, Page and Jones discussed the transhipment option with Gulf Motorship, Inc., agents for WESA, and indicated to Gulf Motorship that the vessel had a good chance to make the cancellation date.

19. In view of the anticipated late arrival of the CONTINENTAL CHARTERER, Furness Withy attempted without success to negotiate an extension of the cancellation date. As a last resort on August 5, Furness Withy instructed ICC to search for an alternate vessel. Texas and Hemmert Exhibit 3. Subsequently, the vessel succeeded in eliminating one discharge port by arranging for the final discharge of its New Orleans steel cargo at

Mobile. The vessel arranged to have the New Orleans cargo transhipped, in an effort to meet the cancelling date.

20. On August 6 the vessel informed Furness Withy that she intended to tranship her New Orleans cargo in order to meet the August 10 cancellation date. At that time the vessel called on Furness Withy to pay part of the cost of the lighter which was required to discharge the steel cargo. Furness Withy refused and maintained that this cost must be paid by the vessel. *See* Texas and Hemmert Exhibit 5.

21. The vessel arrived at Mobile on August 4 and commenced discharge of the steel cargo the following day. On August 6 the vessel gave a four-day notice for an ETA of August 10, 1981. Plaintiff's Exhibit 12. On August 7, 1981, Furness Withy gave WESA a three-day notice for an ETA of August 10. Plaintiff's Exhibit 12.

22. WESA intended to pay the freight due to Furness Withy from the proceeds of the letter of credit. WESA, however, was unable to obtain sufficient domestic financing for the purchase of its first shipment of coal aboard the CONTINENTAL CHARTERER. Wilson required payment in order to turn over the coal and WESA required the coal in order to obtain the negotiating documents from the vessel to negotiate its Chia Hsin letter of credit. In order to obtain the proper documents to negotiate the Chia Hsin letter of credit, WESA must have paid Furness Withy its freight. The freight on the CONTINENTAL CHARTERER, however, was payable upon completion of the loading of the cargo. Dr. Liu, therefore, went to Furness Withy during the first week of August and attempted to renegotiate the terms of freight payment. No agreement was reached to defer payment or modify the terms of payment.

23. On August 5 Dr. Liu learned from Chia Hsin that Furness Withy was searching for a substitute vessel. At this point Dr. Liu was convinced that the CONTINENTAL CHARTERER would not meet her cancellation date. As the August shipment date

drew closer, WESA's need for financing became critical. In early August Dr. Liu sought the assistance of Klaus Hemmert, the President of both Hemmert Shipping Corporation and Hemmert International Corporation. Klaus Hemmert consulted Andy Hewes, one of the principals of Texas Chartering, Inc. WESA first sought short-term financing. Hemmert and Texas proposed to provide a substitute vessel, purchase the Wilson coal, load the coal aboard the substitute vessel and negotiate the Chia Hsin letter of credit. Hemmert insisted that in order for his group to finance the deal, the coal would have to be shipped aboard their vessel and that they would hold title to the coal. Hemmert's proposal eventually became the basis of an agreement between WESA, Hemmert and Texas.

24. Based on the CONTINENTAL CHARTERER's original itinerary, WESA's New Orleans agent, Gulf Motorships, Inc., advised Dr. Liu that the CONTINENTAL CHARTERER would not return to Mobile until the evening of August 12. Plaintiff's Exhibit 50. Gulf Motorships advised Dr. Liu that WESA could obtain a cheaper vessel by chartering a replacement "subject to cancelling" of the CONTINENTAL CHARTERER. Based on this advice concerning the itinerary of the CONTINENTAL CHARTERER, Hemmert attempted to recharter the CONTINENTAL CHARTERER "subject to cancelling" of the original charter with Furness Withy. Plaintiff's Exhibit 73, at 46. When the CONTINENTAL CHARTERER rejected Hemmert's proposal to recharter, Hemmert sent invitations to numerous vessel operators and brokers for a vessel to carry WESA's cargo. Plaintiff's Exhibits 65 and 66.

25. In exchange for Hemmert's assistance, WESA granted Hemmert an exclusive shipping contract on August 5. This contract provided that Hemmert would be granted the exclusive rights to charter all ships for WESA for a period of sixty (60) months. Plaintiff's Exhibit 51. On August 6 WESA and Hemmert entered into a contract of affreightment for the August,

1981 shipment to Taiwan. Plaintiff's Exhibit 51. WESA and World Energy both entered into an Americanized Welsh Coal Charter with Hemmert Shipping Corporation as disponent owner of the M/V EDCO. The freight on the EDCO was $31.50 per metric ton, payable within seven (7) days after completion of loading. WESA was to provide an assignment of the proceeds of the Chia Hsin letter of credit to Hemmert upon arrival of the EDCO at Mobile. The lay days for the EDCO were to commence on August 14. Plaintiff's Exhibit 53. Originally Dr. Liu requested that Hemmert take the COA subject to the cancellation of the CONTINENTAL CHARTERER. Hemmert, however, declined to execute the EDCO COA subject to the cancellation of the CONTINENTAL CHARTERER.

26. On August 7 World Energy executed a power of attorney in favor of Texas to negotiate the Chia Hsin letter of credit. Plaintiff's Exhibit 54. The power of attorney was executed at Atlanta and empowered Texas to prepare or obtain any documents necessary for negotiation of the letter of credit. World Energy also executed an assignment of proceeds of the letter of credit to Texas. The assignment directed the C&S Bank to pay $640,821.76 to Texas if and when payment was made on the letter of credit. Plaintiff's Exhibit 55. The proceeds from the letter were to be used to reimburse Texas and Hemmert for the funds that they expended to purchase the coal. Additionally, World Energy assigned $727,650.00 of the proceeds of the letter of credit to be paid to the owners of the EDCO, Jebsenpoolen, for freight. Plaintiff's Exhibit 56. On August 10 World Energy executed an additional assignment of proceeds of the letter of credit in favor of Texas for $100,862.96,[2] because of an additional "loan" by Texas and Hemmert to WESA and World Energy to enable them to perform the supply contract. Texas and Hemmert Exhibit 13;

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[2] The instructions by WESA to C&S for the distribution of the proceeds under the letter of credit provided: "[This] is not a transfer or assignment of the credit, [and] does not give to the designated payee any interest therein. . . ." Plaintiff's Exhibits 54 and 55.

Plaintiff's Exhibit 78. The assignments represented an initial $500,000.00 "loan" to WESA, a subsequent "loan" to WESA of $100,000.00, interest at an agreed rate, and funds due Hemmert and Texas on the COA.

27. During the negotiations between Dr. Liu and Hemmert, Dr. Liu proposed that Hemmert loan $500,000.00 to WESA in return for assignments of the letter of credit and possession of the negotiating documents. Plaintiff's Exhibit 83. This proposal was turned down and Hemmert insisted that Hemmert and Texas should hold title to the coal themselves. It was the intention of Hemmert and Texas that they hold all title to the coal and have possession of the negotiating documents. Indeed, this is eventually what transpired. Hemmert and Texas purchased the coal from Wilson and additional coal from Smith Coal Sales Co. in Mobile and retained all documents of title, including warehouse receipts and barge bills of lading, in their possession. Texas and Hemmert were joint venturers in the WESA transaction. They were to share any loss or profit in proportion to the amount of money invested in the venture. Texas was to provide 61.7% of the money required to complete the transaction and expertise in the negotiation of the letter of credit. Hemmert was to provide 38.3% of the money and expertise in negotiating the chartering of the vessel.

28. Warrior began moving a shipment of nineteen (19) barge loads of coal down the waterway on or about August 6. Two of these barges did not pass through the Coffeeville, Alabama lock prior to the closing of that lock on August 15.

29. On August 6, WESA, Texas and Hemmert fixed the EDCO to carry the coal for $28.00 per metric ton. WESA was to pay Texas and Hemmert $31.50 per metric ton. The EDCO was to pay a 3.75% commission to Texas and Hemmert. *See* Plaintiff's Exhibits 70, 71 and 74.

30. On August 6 Hemmert sent WESA a seven (7) day notice that the ETA for the EDCO was August 13. Plaintiff's

Exhibit 75. On August 10 the EDCO published her ETA as 17:00 hours, August 13. Plaintiff's Exhibit 77.

31. The first $500,000.00 advanced by Texas and Hemmert was transferred to an escrow account at the Birmingham Trust National Bank (hereinafter "BTNB") during the period August 6 through August 12. Texas and Hemmert Exhibit 7. Prior to August 7 $30,000.00 had been transferred by Hemmert and Texas to the BTNB escrow account and none of these funds had yet been released to either WESA or its cargo suppliers. Hemmert instructed BTNB to release these funds from the escrow account upon presentation of barge bills of lading issued by Warrior at the rate of $22.00 per metric ton of cargo loaded aboard Warrior's barges. *Id.* On August 10, Hemmert and Texas agreed to increase their loan to WESA by no more than an additional $100,000.00 and in return World Energy instructed C&S to pay $100,862.96 from the proceeds of its letter of credit to Texas. Plaintiff's Exhibit 78.

32. The CONTINENTAL CHARTERER completed the discharge of her inbound cargo at 19:25 hours on August 9. Plaintiff's Exhibit 61. The discharge operations had not been interrupted by rain. Because it was dark at the time the vessel completed her discharge, she did not shift to the WESA berth until the morning of August 10. The vessel shifted and berthed at 08:55 hours at the WESA terminal, all engines stopped at 09:10 hours, August 10. *Id.* At 09:55 hours on August 10 WESA repudiated the Furness Withy COA by taking the position that the CONTINENTAL CHARTERER was not ready to take on cargo. Plaintiff's Exhibit 14. She was, in fact, ready to take on the coal cargo.

33. On August 12 WESA notified the CONTINENTAL CHARTERER that she was illegally berthed at its private terminal. WESA demanded that the vessel vacate the terminal or face legal action. Plaintiff's Exhibit 58.

34. After the cancellation of the vessel by WESA, Furness Withy commenced filing lawsuits. First, Furness Withy filed an action in this court on August 13, 1981, against WESA and the other defendants. Pursuant to 9 U.S.C. § 8, Furness Withy initiated proceedings to attach the coal cargo, but reserved its rights to arbitrate under the terms of the charter and the COA. The cargo was eventually released after security was posted pursuant to Fed. R. Civ. P. Supp. E(5). A second action was filed on August 14, 1981, in the Northern District of Georgia where Furness Withy initiated proceedings to attach certain funds in the form of the letter of credit. In this action, as in the first, Furness Withy reserved all its rights to arbitrate. In the Georgia case security was posted in order to obtain release of the letter of credit. The Georgia action was transferred to this court and was consolidated with the first action. A third action was filed in the District Court of New Jersey on August 14, 1981. Ultimately, that action was abandoned because Furness Withy was not able to attach any assets there.

35. On August 17 WESA, through Gulf Motorships, Inc., attempted to cancel the EDCO. WESA claimed that a force majeure entitled it to cancel the charter. Texas and Hemmert rejected the cancellation and proceeded to perform the contract. Texas and Hemmert Exhibit 14.

36. On August 21, 1981, all parties to this action executed a stipulation for the release of the letter of credit which was attached. *See* C. A. No. 81-0763-C, Document No. 27, Exhibit A. The writs of attachment on the coal were eventually dissolved under the terms of the stipulation and the coal was shipped aboard the EDCO. All parties reserved all of their respective rights to litigate or arbitrate this matter at a future date. *Id.* Once the coal was loaded aboard the EDCO and the negotiating documents released pursuant to the parties stipulation, the Chia

Hsin letter of credit proceeds were disbursed.[3] Texas and Hemmert Exhibit 16.

37. On August 20, 1981, WESA executed a demand promissory note payable to the order of Texas and Hemmert. Texas and Hemmert Exhibit 12. The principal amount of the note was $564,380.60. Interest on the principal was to be computed at a rate defined as "equal to a fixed rate of 2.00% plus a variable rate defined as the prime rate being the highest rate of interest charged by any member of the New York Clearing House for commercial loans of short term maturities . . . ." *Id.*, at 7. The parties to this note have stipulated as to the amount due. The amount owing under the note from WESA to Texas and Hemmert is $605,621.53, principal, and $231,621.53, interest as of April 12, 1984. *See* Letter to the court of April 12, 1984, from Thomas S. Rue, attorney for WESA. There has been no agreement or stipulation as to the amount of attorneys' fees owned under the terms of the note. *Id.* The note provided for an attorneys' fee of 20% of the amount of the debt. All factors considered, the court finds an attorneys' fee of 15% to be reasonable.

38. Because two barges did not pass the locks before they closed, Texas was forced to purchase additional coal on the Mobile market in order to enable the parties to perform the Chia Hsin supply contract. On August 25 Texas purchased an additional 4,999 metric tons of coal for $247,450.00 from Smith Coal Sales Company. This was substantially more than required to

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[3] The proceeds of the letter of credit were disbursed on September 14, 1981, as follows: (a) $210,000.00, posted as security in the Northern District of Georgia; (b) $390,000.00, posted as security in the Southern District of Alabama; (c) $90,000.00, to counsel for Furness Withy for payment of stevedores, Cooper Stevedoring, Inc.; (d) $148,723.33, to counsel for Furness Withy for payment of Warrior's freight; (e) $727,650.00, to the EDCO; (f) $328,376.00, to Texas in payment for additional coal purchased from Smith Coal Sales, Inc.; and (g) $5,250.00, to C&S as bank charges.

perform the contract, but increased the potential profit available. Texas and Hemmert Exhibit 9.

39. Under the terms of the contract with the owners of the CONTINENTAL CHARTERER, Furness Withy was obligated to pay the freight originally negotiated at $30.80. The owners of the vessel rejected Furness Withy's offers to renegotiate the original freight rates. *See* Plaintiff's Exhibits 21, 22, 23, 24 and 25. Furness Withy was also obligated to pay the vessel's bunkers and agents' commissions. *See* Plaintiff's Exhibits 29, 30, 31, 32, 33, 34, 35 and 36.

40. On August 20, 1981, Furness Withy obtained a substitute cargo for the CONTINENTAL CHARTERER. The original voyage charter was converted into a time charter at a rate of $20.00 per metric ton of cargo. Plaintiff's Exhibit 21. Furness Withy was unable to cancel the original charter for the vessel.

41. After mitigation of its damages by finding a substitute cargo for the CONTINENTAL CHARTERER, Furness Withy suffered a loss of $655,703.99 exclusive of interest and costs, as a result of the cancellation of the August shipment. Plaintiff's Exhibits 17, 20-36. Furness Withy's damages as a result of the cancellation of the second shipment are equal to $342,216.98. The award of the arbitrators fairly fixed the damages suffered and interest which should be paid thereon.

42. The officers, directors and shareholders of WESA were also the officers, directors and shareholders of World Energy. Plaintiff's Exhibits 41 and 43. WESA did not maintain any offices of its own but instead shared the offices of World Energy in Knoxville, Tennessee. Both World Energy and WESA shared the same telex machine using the same answerback and signature of "WESA." *See e.g.,* Plaintiff's Exhibit 49. The corporate stationary of World Energy used the logo "WESA, Inc." on its letterhead. *See e.g.,* Plaintiff's Exhibit 41. World Energy applied for its letter of credit with C&S in the name of "WESA, Inc." Plaintiff's Exhibit 48. The officers and directors of World Energy

signed corporate letters and minutes in the name of "WESA, Inc." *See e.g.,* Plaintiff's Exhibits 40 and 41. World Energy used the name "WESA" in its contracts. *See e.g.,* Plaintiff's Exhibit 42. Indeed, World Energy and WESA used the name "WESA" interchangeably.

43. When Dr. Liu began negotiations with Furness Withy's representatives for WESA's contract of affreightment, he advised Furness Withy that WESA's assets included various coal mines when in fact they held only leases in the name of World Energy. The only significant assets of WESA at the time it entered into its contract with Furness Withy were the coal supply contracts previously assigned by World Energy to WESA. By virtue of this assignment, WESA was entitled to all proceeds from the letter of credit as well as all other revenues received under those contracts. After Furness Withy instituted these actions WESA relinquished and returned to World Energy all rights under this assignment including all interest in the supply contracts. This surrender of WESA's interest in World Energy's supply contracts was made solely because of "the financial difficulties [of] WESA, Inc." without consideration being paid by World Energy to WESA. Plaintiff's Exhibit 41, at 85-86.

44. At the time Furness Withy instituted the Atlanta action, WESA and World Energy were not conducting business within that district nor did they have an agent within that district for service of process. The process of attachment and garnishment in the Atlanta action was served on C&S on August 13. World Energy and WESA did not answer or otherwise make a general appearance in the Atlanta action until they filed their answer on October 2, 1981.

45. A hearing was held before the Hon. Chief Judge Charles A. Moye, Jr. in the Atlanta action on August 17 to consider the validity and effect of Furness Withy's attachment and garnishment. On August 18 Chief Judge Moye issued an order lifting Furness Withy's attachment and garnishment on the condition

that $210,000.00 of the proceeds from the C&S letter of credit be posted in court as security for Furness Withy's claims against World Energy and WESA. At the time of Chief Judge Moye's August 18 order a total of $430,666.20 was still payable to World Energy and WESA after C&S satisfied all of their previous instructions concerning distribution of the proceeds from the letter of credit. Plaintiff's Exhibits 55, 56, 78 and 84.

46. At the time Furness Withy instituted its action in Mobile against World Energy and WESA they did not have any officers or agents within the Southern District of Alabama who could accept service. Prior to this shipment World Energy and WESA were not conducting business within the Southern District of Alabama on a regular basis. At the time Furness Withy instituted the Mobile action Warrior's barges carrying the cargo were underway on the Warrior, Tombigbee and Mobile Rivers.

47. Due to the location of the cargo at the time Furness Withy instituted the Mobile action, it was impracticable for the U. S. Marshal to take this property into his actual possession. The U. S. Marshal obtained constructive custody over the coal cargo during the early afternoon of August 13 by service of the summons and writ of attachment and garnishment on the party which had control of this property, Warrior, at their offices located in Mobile. Plaintiff's Exhibit 87. After receiving service of Furness Withy's summons and writ of attachment and garnishment, Warrior agreed to shift its barges further south into the Port of Mobile where they would be more accessible to the Marshal's Deputies. On August 14 Warrior's barges began arriving in the Port of Mobile and the U. S. Marshal commenced taking the coal into his actual custody. Plaintiff's Exhibit 89.

48. The court held a hearing during the afternoon of August 14 in the Mobile action to determine the validity of Furness Withy's attachment and garnishment. By the time of this hearing all of Warrior's barges were located south of mile 300 on the Warrior Tombigbee River system which marks the northern most

boundary of the Southern District of Alabama. Plaintiff's Exhibits 90, 91, 92 and 93.

49. At the time the writs of attachment and garnishment were issued, Furness Withy had every reason to believe that the coal was owned by WESA. Furness Withy acted in good faith in seeking the issuance of the writs, and was not guilty of bad faith, malice or gross negligence.

50. The interest of Texas and Hemmert in the letter of credit at the time the attachments and garnishments were executed, represented by assignments, was $648,930.86. See Defendant's Exhibit 22. They paid $43,800.00 to the EDCO because of the delay in Mobile occasioned by these attachments, which represents special expenses necessarily incurred by reason of the attachments which is not technically custodial expense but closely akin the custodial expense. Cargo caught above the locks was sold, and the cargo on one barge was lost when the barge sank, as a result of which Texas and Hemmert received $88,998.60 (from the insurer of the lost cargo and the sale of the other cargo), which they acknowledge should give rise to a credit against sums due them. See Defendant's Exhibit 23.

51. The interest paid by Texas and Hemmert on money which they borrowed during the times in question was "New York prime plus 2%," which fluctuated but averaged something like 14.15%.

CONCLUSIONS OF LAW

1. This is an admiralty claim within the meaning of Fed. R. Civ. P. 9(h). This court has jurisdiction over this action pursuant to 28 U.S.C. § 1333. In addition, the counterclaim of World Energy, the cross-claims of Texas and Hemmert filed against WESA and World Energy on a promissory note, and the counterclaims and claims made by way of intervention filed by Texas and Hemmert against the plaintiff are within either the diversity or admiralty jurisdiction of this court. 28 U.S.C §§ 1332, 1333.

This court also has *in personam* jurisdiction over all parties to this action.

WESA's Contractual Liability to Furness Withy

2. Furness Withy is entitled to entry of judgment against the defendant WESA pursuant to the arbitration award entered on May 14, 1982, and confirmed by order of this court on October 6, 1983, and pursuant to the arbitration award entered on December 30, 1982, and confirmed by order of this court on October 6, 1983. Order on Plaintiff's Motions to Confirm Arbitration Awards, C.A. No. 81-0571-C, Document No. 101. *See American Fed. of State, Co. and Municipal Employees* v. *Walker Co. Medical Center, Inc.*, 715 F.2d 1517 (11th Cir. 1983).

Texas and Hemmert's Liability to Furness Withy For the Tort of Interference With Its Contract With WESA

3. Furness Withy asserts that both Texas and Hemmert are liable for their interference with the performance by WESA of the COA and charter for the shipment of cargo aboard the CONTINENTAL CHARTERER. *See* Pre-Trial Order, at 9. The admiralty jurisdiction of the court, as to this claim, is invoked by Furness Withy. The contracts at issue here are maritime contracts, and therefore, the general maritime law is applied. *E.g., Morewood* v. *Enequist,* 64 U.S. (23 How.) 491 (1860) (charter party); *New Jersey Steam Nav. Co.* v. *Merchants' Bank,* 47 U.S. (6 How.) 344 (1848) (contract for the carriage of goods); *G. Gilmore & C. Black, THE LAW OF ADMIRALTY,* 22 (1975) [hereinafter *"Gilmore & Black"*].

4. The *Restatement (Second) of Torts* [hereinafter "Restatement"],[4] Section 766A, provides:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third party, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

5. Section 766 of the *Restatement* provides that:

> One who intentionally and improperly interferes with the performance of a contract . . . by inducing or otherwise causing the third person not to perform the contract, is subject to liability. . . .

Comment j to section 766 illustrates that the defendant is liable where he acts for the primary purpose of interfering with the performance of the contract.

6. The tort of interference with a contractual relationship is an intentional tort. *See Restatement* §§ 762-74. The tort is intentional in the sense that the defendant must have either desired to bring about the harm to the plaintiff or have known that this result was substantially certain to be produced by its conduct. Liability under this theory depends upon the interplay of several factors and is not reducible to a single rule. Moreover, there is considerable disagreement as to the proper standards to be applied because the law in this area has not fully congealed but is still in a formative stage. *Id.* § 766.

7. "The law has traditionally been reluctant to recognize claims based solely on harm to interest in contractual relations or business expectancy." *Dick Meyers Towing Serv.* v. *United States,* 577 F.2d 1023, 1025 (5th Cir. 1978). As stated in *Kaiser*

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[4] The *Restatement* provides appropriate principles of law for determining questions within the court's admiralty jurisdiction. *See. e.g., Pino* v. *Protection Maritime Ins. Co., Ltd.,* 599 F.2d 10, 14 (1st Cir.), *cert. denied,* 444 U.S. 900 (1979).

Aluminum & Chem. Corp. v. *Marshland Dredging Co.*, 455 F.2d 957, 958 (5th Cir. 1972) (per curium), a plaintiff may not recover for interference with his contractual relations unless he shows that the interference was intentional or knowing. *See also W. Prosser, LAW OF TORTS*, § 129, at 938-42 (4th ed. 1972); *Federal Commerce & Nav. Co.* v. *M/V Marathonian*, 392 F. Supp. 908, 910-16 (S.D. N.Y. 1975). In general, "malice in the sense of ill will need not be shown; intent (knowledge to a substantial certainty) is ordinarily enough." *Allied Intern.* v. *International Longshoremen's Ass.*, 640 F.2d 1368, 1384 (1st Cir. 1981) (Aldrich, C.J., dissenting), *aff'd*, 456 U.S. 212, *cert. denied*, 102 S. Ct. 3508 (1982).

8. The defendants Texas and Hemmert are free to conduct their business in the usual manner, to advertise their services, to extol the quality of their services, to fix their prices and to sell their services notwithstanding the fact that Furness Withy had contracted to provide similar services. *See Restatement* § 766, comment m. Texas and Hemmert did not "induce" or "force" WESA to choose one course of conduct rather than another. Whether Texas and Hemmert "caused" the choice by persuasion or by intimidation, WESA was free to choose to fulfill the CONTINENTAL CHARTERER contracts if it was willing to suffer the consequences. It is essential that Texas and Hemmert intended to cause the results which are complained of. If Texas and Hemmert did not have this intent, their conduct does not subject them to liability, even if the effect was to deter WESA from fulfilling its contracts with Furness Withy. *See Id.* § 766, comment h. In this action there was an absence of ill will or malice on the part of Texas and Hemmert. Even though ill will or malice is not an essential element of liability, the absence of these elements clarify the purposes of the defendants' conduct. The absence of ill will and malice is, therefore, an important factor in determining whether the interference was improper. *Id.*, comment r and s.

9. There has been a complete failure of proof as to this theory of recovery against Texas and Hemmert. It cannot be said that Texas and Hemmert intentionally interfered with Furness Withy's contractual rights with WESA.

Fraudulent Conveyance of the Chia Hsin Letter of Credit

10. Furness Withy asserts that WESA is liable for its attempts to defraud and/or delay Furness Withy's recovery in this action by fraudulently conveying its assets to Hemmert and Texas. The plaintiff alleges that WESA, Hemmert and Texas engaged in a series of transactions in an effort to shield WESA's property from the claims of Furness Withy. *See* Pre-Trail Order, Part IV(C). Specifically, Furness Withy asserts that it is entitled to recover the damages it suffered as a result of the instructions by World Energy to the C&S Bank relative to the letter of credit which prevented Furness Withy from receiving the freight owed by WESA for the CONTINENTAL CHARTERER.

11. The letter of credit in this action may be described as an engagement, undertaking or promise by the C&S Bank to pay money on behalf of Chia Hsin for whom it had issued the credit. Under the letter of credit the C&S Bank was instructed to, and agreed to, pay drafts only if the drafts were accompanied by the negotiating documents specified in the letter. In this case, WESA properly conveyed or assigned proceeds under the letter. *See Infra* paragraphs 29-35. A conveyance is fraudulent when its object or effect is to defraud another, or when its intent is to avoid some duty or debt owing by the party making the transfer. The various tests for fraud in this context include the good faith of the transaction, prejudice to Furness Withy, the intent of the parties, and the existence of adequate consideration. *See generally* 37 C.J.S. *Fraudulent Conveyances* § 7 (1943 and Supp. 1983).

12. First and foremost it must be said that Texas and Hemmert provided adequate consideration for the assignments of the

proceeds of the letter of credit. Substantial sums were advanced by Texas and Hemmert in order to purchase the coal. Texas and Hemmert obligated themselves to pay over $727,000.00 in freight to the EDCO.

13. At the time Dr. Liu approached Andy Hewes, everyone concerned, including Furness Withy, was convinced that the CONTINENTAL CHARTERER would not meet her cancellation date. Texas and Hemmert had obligated themselves to both the EDCO and the coal producers by the time they learned that Furness Withy would be able to carry the cargo. Furness Withy must prove either actual fraud or constructive fraud in order to prevail under the theory that this conveyance was fraudulent. *See e.g., Alabama Credit Corp.* v. *Deas,* 417 F.2d 135 (5th Cir. 1969). This transaction was not in fraud of Furness Withy because there was no showing of an intention to hinder, delay or defraud.

14. Furness Withy's proof fails in all respects as to this theory of recovery.

World Energy as the Alter Ego of WESA

15. Furness Withy asserts that it is entitled to entry of judgment against World Energy as well as WESA because both corporations have been shown from the evidence to be merely alter egos and virtually indistinguishable from one another. Where one corporation is the alter ego of another, the corporations may be held liable for the obligations of each. That is, where there is such a unity of interest and ownership that the separateness of the two corporations has ceased to exist, and the facts are such that an adherence to the fiction of a separate existence would promote an injustice, then the separateness may be ignored. *See generally* 19 C.J.S. *Corporations* § 839 (1940 and Supp. 1983).

16. Whether the corporate veil should be pierced depends upon the individual equities of each case. *See United States* v.

Standard Beauty Supply Stores, 561 F.2d 774 (10th Cir. 1977). It is clear that Admiralty Courts can pierce the corporate veil in order to reach the "alter egos" of a corporate defendant. *Swift and Company Packers* v. *Compania Colombiana Del Caribe, S.A.,* 339 U.S. 684, 70 S. Ct. 861 (1950).

17. In order to prevent manifest injustice to Furness Withy, the identity of the two corporations should be disregarded. *See Houston Oil Field Material Co.* v. *Stuard,* 406 F.2d 1052, 1054 (5th Cir. 1969). In this case, WESA became the mere conduit for World Energy, and as such World Energy should be liable for the acts of WESA. *See Mayo* v. *Pioneer Bank & Trust,* 274 F.2d 320, 321 (5th Cir. 1960) (where one corporation is a mere conduit, veil should be pierced).

18. Here the veil should be pierced to prevent an injustice. The record clearly demonstrates the interchangeable character of the two corporations, a confusion of corporate finance and records, a failure to follow usual formality, and the fact that WESA was undercapitalized. The most striking example of non-separateness is the Chia Hsin transaction. The Chia Hsin contract was first transferred to WESA from World Energy, then only after this litigation began, was retransferred back to World Energy from WESA. Indeed, the Chia Hsin contract was WESA's only significant asset. *See Talen's Landing, Inc.* v. *M/V Venture,* 656 F.2d 1157, 1160-61 (5th Cir. 1981) (Unit A) (piercing veil under similar circumstances in admiralty context); *Bordagain Shipping Co.* v. *Saudi American Lines, S.A.,* 1979 A.M.C. 1058, 1071-72 (S.D. La. 1978), *aff'd,* 623 F.2d 710 (5th Cir. 1980). In this action, the acts of WESA were tantamount to the acts of World Energy. *See e.g., St. Paul Ins.* v. *Talladega Nursing Home,* 606 F.2d 631 (5th Cir. 1979) (Alabama law).

Hemmert and Texas as Joint Venturers With WESA

19. Furness Withy argues that "by virtue of the transaction which occurred on August 7, Hemmert and Texas became joint

venturers with WESA for the purpose of shipping WESA's cargo to Taiwan." Post Trial Brief filed by Furness Withy, July 2, 1984, at 19. This theory of liability fails for several reasons.

20. A joint venture is generally described as an association of persons or corporations to carry out a single business enterprise for profit. *E.g., Underwood* v. *Holy Name of Jesus Hospital,* 266 So.2d 773, 776 (Ala. 1972). Among the elements essential to the relation are an intent of the parties and their consent to the formation of a joint venture, a fiduciary relationship between the members, a community of interest in the performance of a common purpose, and joint management and control of the enterprise. These elements were not present in the instant action. *See generally* 48A C.J.A. *Joint Ventures* § 10 (1981 and Supp. 1983); *Moore* v. *Merchants & Planters Bank,* 434 So.2d 751, 753 (Ala. 1983).

21. Texas and Hemmert did not expect, nor have the right to, participate in the profits of WESA. WESA also did not have the expectation or right to participate in the profits of Texas and Hemmert. There was no common ownership of anything between the parties and no joint control over various aspects of the transaction. *See Central Bank of Alabama* v. *Gillespie,* 404 So.2d 35 (Ala. 1981). By no means was there any fiduciary relationship created between the parties to this transaction.

The Attachments and Garnishments

22. The attachment of the coal in this court and the attachment in the Northern District of Georgia of the letter of credit was made pursuant to Fed. R. Civ. P. Supp. B.[5] The Eleventh

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[5] Fed. R. Civ. P. Supp. B reads in pertinent part:

> (1) When Available: Complaint, Affidavit, and Process. With respect to any admiralty or maritime claim *in personam* a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant

Circuit has recently taken the position that Rule B does not violate the constitutional guarantees of procedural due process. *Schiffahartsgesellschaft Leonhardt & Co.* v. *A. Bottacchi S.A. De Navegacion,* 732 F.2d 1543 (11th Cir. 1984). Based on the prior notice of seizure and the August 14 hearing held in this case, the court can find no constitutional infirmities in the manner in which Rule B was applied in this action. Since the Rule is facially constitutional, and was not applied in a manner which deprived the parties of procedural due process, Texas and Hemmert's arguments attacking constitutionality of the Rule must fail. *See also Polar Shipping, Ltd.* v. *Oriental Shipping Corp.,* 680 F.2d 627 (9th Cir. 1982); Note, 7 *MAR. LAWYER* 159 (1982).

23. The process of attachment and garnishment in admiralty is auxiliary to process *in personam, United States* v. *Knauth,* 183 F.2d 874 (5th Cir. 1950), *cert. denied,* 340 U.S. 892 (1951), and is designed to obtain jurisdiction *in personam* of the defendant, through his property. *See e.g., Seawind Compania, S.A.* v. *Cresent Line, Inc.,* 320 F.2d 580 (2d Cir. 1963); *Nea Armonia Shipping* v. *Antco Shipping,* 409 F. Supp. 967 (M.D. Fla. 1976). The purpose of an attachment is two fold. First, the process is issued in order to compel the appearance of a party to the action. *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S.A.,* 339 U.S. 684, 70 S. Ct. 861 (1950). Secondly, the attachment of a party's property assures the satisfaction of a judgment. *Id.; East Asiatic Co.* v. *Indomar, Ltd.,* 422 F. Supp. 1335 (S.D. N.Y. 1976). Although the writ may be utilized to satisfy a judgment, it

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shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property . . . .

may not be used solely for the purpose of acquiring security,[6] for security cannot be obtained except as an adjunct to obtaining jurisdiction. *See Chilean Line, Inc.* v. *United States,* 344 F.2d 757 (2d Cir. 1965).

24. Under the Supplemental Rules, a writ of attachment may be served only within the district and the question of the presence of the property within the district is governed by federal law. *Det Bergenske Dampskibsselskab* v. *Sabre Shipping,* 341 F. 2d 50 (2d Cir. 1965); Annot., 12 A.L.R. 3d 1081 (1967). Additionally, questions as to the validity of such process is governed by the law of admiralty. *See Esso Standard (Switzerland)* v. *The Arosa Sun,* 184 F. Supp. 124 (S.D. N.Y. 1960). In the instant case, the property was within the district and subject to process.

25. The writ is available to the plaintiff only when the defendant cannot be found within the district. The question whether a defendant can be found within a district must be governed by the facts of each case. In the case of a nonresident the question presents a two pronged inquiry. First, it must be determined whether the defendant can be found within the district in terms of jurisdiction *in personam.* Second, if the defendant can be found within the district for purposes of jurisdiction, then it must be determined whether the defendant can be found for purposes of service of process. *See Chilean Line, Inc.* v. *United States,* 344 F.2d 757 (2d Cir. 1965). In this action the parties could not be found within the district for purposes of service, although they were subject to the court's jurisdiction.

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[6] *See Cordoba Shipping* v. *Maro Shipping,* 494 F. Supp. 183, 185 (D. Conn. 1980) (Rule B does not authorize attachment solely as device to secure judgment).

The Garnishment or Attachment of the Chia Hsin Letter of Credit

26. In general, in order to be subject to attachment a debt must be past due or yet to become due, certainly or upon demand. An indebtedness, such as a letter of credit, is not attachable unless it is payable at present or in the future. Where a duty to pay is conditioned upon contractual contingencies, there is no attachable debt certain to become due. The Chia Hsin letter was contingent in all respects. At the time of garnishment, none of the negotiating documents had been presented and the C&S Bank was under no obligation to pay anyone. The letter was not, therefore, subject to garnishment.[7]

27. Additionally, where property has been validly transferred or assigned by the defendant, (WESA), that property cannot be subject to garnishment as belonging to the defendant. *See e.g., Roberts* v. *Metropolitan Life Ins.*, 94 F.2d 277 (2d Cir. 1938), *cert. denied* 303 U.S. 660 (1939). *See generally* 38 C.J.S. *Garnishment* § 77, at 273 (1943 and Supp. 1983). A beneficiary under a letter of credit may assign his rights to the proceeds as security for a loan under section 5-116(2) of the Uniform Commercial Code. This is true even though the letter provides that it is not transferable. Section 5-116(2) allows the assignee to protect himself by taking possession of the letter and sending notice of the assignment to the issuer. In the instant case, Texas and Hemmert had possession of the negotiating documents and had notified the C&S Bank of the assignment. Thus, Texas and Hemmert had a security interest with priority over subsequent garnishing creditors under Article Nine of the Code. *See* U.C.C. §§ 9-201, 9-301; *J. White & R. Summers, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 18-9, at 751 (2d ed. 1980).

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[7] *See generally* 7A *J. Moore, MOORE'S FEDERAL PRACTICE*, ¶ B.04 (1983 & Supp. 1984) (what may be attached or garnished); 38 C.J.S. *Garnishment* § 87, at 291 (1943 and Supp. 1983) (uncertain and contingent debt not subject to garnishment).

28. The assignees, therefore, had protected themselves against creditors of the assignor. Furness Withy, as a mere unsecured creditor of WESA, sought by garnishment to reach WESA's rights under the letter of credit. Texas and Hemmert, however, as holders of a security interest had priority over the claims of Furness Withy to the rights under the letter.

The Attachment of the Cargo

29. Texas and Hemmert claim that they are the owners of the coal, and therefore the coal was not subject to seizure by Furness Withy. Pre-Trial Order, Document No. 104, at 15. On the other hand, Furness Withy argues that Texas and Hemmert's interest in the coal amounted to only a pledge rather than a transfer of title and therefore it was entitled to seize the coal to protect its rights. *Id.*, at 7-9; Plaintiff's Proposed Conclusions of Law filed July 2, 1984, at 6-8.

30. In the instant case, it is undisputed that Texas and Hemmert financed the purchase of the coal by initially advancing approximately $600,000.00. These monies were transferred to BTNB to be held in trust for payment to the coal producers in North Alabama. The funds were held by BTNB to be disbursed against: (a) barge bills of lading issued by Warrior in the name of Hemmert; (b) commercial invoices and warehouse receipts in the name of Hemmert; and (c) various certificates and draft surveys.

31. The methods employed by Texas and Hemmert are typical methods used to protect the interest of one who finances a commercial transaction. This transaction was essentially a "documentary contract of sale." In a documentary contract of sale the buyer (Texas and Hemmert) is required to pay drafts on presentation of documents, without the right to inspect the cargo beforehand. Stated differently, in a documentary sale tender of the goods is made by presentation of documents, not by delivery of goods. The goods move under a negotiable bill of lading. "Ownership" then cannot be ascertained by the traditional indicia

of possession of the goods but must be ascertained by looking to see who controlled the documents of title.[8] *See Gilmore & Black,* at 110.

32. Under this documentary contract of sale, the seller could only make a proper tender by a due presentation of the specified documents. Included among the specified documents required to trigger payment by BTNB was the all important barge bill of lading. A bill of lading is generally an acknowledgment by a carrier that it has received goods for shipment. Second, the bill is a contract of carriage. Third, the bill is a document of title that evidences possession of the goods. The bill is one of the indispensable documents in financing the movement of commodities. *See generally Gilmore & Black,* at 93.

33. It is clear in this case that WESA had none of the traditional indicia of ownership. It did not hold any of the documents of title such as the bills of lading or warehouse receipts. It had no right to possession of the coal. Upon delivery of the coal and presentation of the proper documents, WESA had no right to payment from the funds held by BTNB. The only parties who held any of the indicia of ownership were Texas and Hemmert.

34. Furness Withy had no lien against the coal. Furness Withy had no security interest in the coal, perfected or otherwise. It did not have possession of any of the critical documents such as the barge bills of lading or the warehouse receipts. Furness Withy had no rights to the coal. It was a mere unsecured creditor of WESA with a cause of action for breach of contract against WESA.

35. Since no goods, chattels, credits or effects of WESA were in the hands of Warrior, and since Furness Withy had no lien or

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[8] The Uniform Commercial Code provides that a " 'Document of Title' includes bills of lading, [and] . . . warehouse receipts. . . ." U.C.C. § 1-201(15) (1977); Ala. Code § 7-1-201(15) (1977).

claim on the cargo, WESA had no interest in the cargo subject to attachment. *See Nea Armonia Shipping* v. *Antco Shipping,* 409 F. Supp. 967, 969 (M.D. Fla. 1976).

Furness Withy's Liability for Wrongful Attachment and Garnishment or Conversion

36. The defendants seek to hold Furness Withy liable for damages and expenses arising out of the wrongful attachment and garnishment of their property. Since there has been no showing of bad faith, malice or such negligence as amounts to bad faith on the part of Furness Withy, damages are not recoverable for wrongful attachment. *See Ships & Freights, Inc.* v. *Farr, Whitlock & Co.,* 188 F. Supp. 438, 439 (E.D. N.Y. 1960); *Applewhaite* v. *S.S. Sunprincess,* 136 F. Supp. 769, 771 (D. N.J. 1956); and 2 C.J.S. *Admiralty,* § 156(d), at 272.

Dissolution of the Writs and Distribution of the Property

37. The writs of garnishment and attachment in this action were dissolved pursuant to the stipulation entered into by the parties on August 21, 1981. *See* C.A. No. 81-571-C, Document No. 36. The stipulation stated that it was "without prejudice and the parties reserve all of their rights and claims." *Id.,* at 6. On August 18, 1981, Judge Pittman ordered that the plaintiff, Furness Withy, post a security bond[9] in the amount of $800,000.00 to "answer the decree of the court, if any, . . ., rendered in favor of" Texas or Hemmert. C.A. No. 81-571-C, Document No. 23. *See* Fed. R. Civ. P. Supp. E(2)(b), and E(7).

38. Ordinarily, on the dissolution of an attachment all property attached should be returned to the defendant or owner as his

[9] The object of the security is to protect the prevailing party but not as security for damages caused by a wrongful seizure. 7A *J. Moore, MOORE'S FEDERAL PRACTICE* ¶E.04, at E-151 (1983 and Supp. 1984).

interest may appear. Additionally, the court, in whose registry a fund is deposited for the payment of claims, has the duty to determine who is entitled to such fund. *See Reliable Marine Boiler Repair* v. *Sum of $35,000.00*, 270 F. Supp. 1017 (S.D. N.Y. 1967; 7 C.J.S. *Attachment* § 369 (1983 and Supp. 1984). In this action the bond posted by Furness Withy can be said to fairly represent the property attached. Texas and Hemmert are due to have their property returned to them, and are due to have their costs. Since the property is no longer before the court, Texas and Hemmert are entitled to recover an equivalent amount plus expenses necessarily incurred by reason of the issuance of the writs. In other words, the parties should be placed in a position they would have been in had the writs been dissolved immediately after they were entered. The interest of Texas and Hemmert in the attached property can be summarized as follows:

(a) $648,930.86, an amount representing the money advanced by Texas and Hemmert and their expectant profits;

(b) $43,800.00, an amount representing the demurrage paid on the EDCO as special expenses necessarily incurred by reason of the attachment;

(c) Interest on the sum of (a) and (b), above, based on 14.15% per annum, an average of the rates charged during the relevant period of time, from September 15, 1981, to the date of this judgment.

39. Other amounts claimed by Texas and Hemmert, that is, attorneys' fees and travel expenses, are the usual and ordinary non-taxable costs of litigation, and as such are not recoverable on these facts. Punitive damages claimed by Texas and Hemmert are not appropriate since there has been no showing of malice, ill will or gross negligence on the part of Furness Withy.

Furness Withy is due a credit of $88,998.60 against the total of said sums because of sums previously recovered by Texas and Hemmert.

APPROPRIATE RELIEF

The court deems the following to be appropriate relief in this case:

(a) Having determined that World Energy Systems Associates, Inc. is the alter ego of WESA, Inc., the court should enter a judgment in favor of Furness Withy (Chartering) Panama, Inc. against World Energy Systems Associates, Inc. which has the effect of making them jointly and severally liable with WESA, Inc. to Furness Withy (Chartering) Panama, Inc. in an amount equal to the sums awarded by the arbitrators, which sums fairly fix the damages suffered by Furness Withy (Chartering) Panama. Inc.

(b) Hemmert International Corporation and Texas Chartering, Inc. jointly are entitled to a judgment against WESA, Inc. on the promissory note dated August 20, 1981, in an amount to principal of $605,621.53, interest accrued through April 12, 1984, of $231,621.53, an attorneys' fee of 15% of the total of said sums ($125,586.46), and declaratory relief to the effect that WESA, Inc. is liable to Hemmert International Corporation and Texas Chartering, Inc. for interest which has accrued on said note since April 12, 1984, through the date of entry of this judgment according to the terms of said note.

(c) Hemmert International Corporation and Texas Chartering, Inc. are entitled to a judgment against Furness Withy (Chartering) Panama, Inc. in the sum of $603,732.26 (being $648,930.86 plus $43,800.00 less $88,998.60) plus interest on said sum at the rate of 14.15% per annum from September 15, 1981, through the date of entry of this judgment.

DONE this 26th day of October, 1984.

/s/ EMMETT R. COX
United States District Judge

APPENDIX G

IN THE

United States District Court

FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FURNESS WITHY (CHARTERING), PANAMA, INC., *Plaintiff.* vs. WORLD ENERGY SYSTEMS ASSOCIATES, INC., WESA, INC., HEMMERT SHIPPING CORPORATION, HEMMERT INTERNATIONAL CORPORATION, and TEXAS CHARTERING, INC., *Defendants.*	CIVIL ACTION NO. 81-0571-C CIVIL ACTION NO. 81-0763-C

FINAL JUDGMENT

It is ORDERED and ADJUDGED that the plaintiff Furness Withy (Chartering) Panama, Inc. have and recover of the defendant World Energy Systems Associates, Inc. the sum of: (a) $718,939.00; and (b) a sum equal to interest at the rate of 16.5% per annum on the sum of $655,703.99 from May 14, 1982, through the date of entry of this judgment; and (c) the sum of $1,177.50 (partial costs of transcripts).

It is FURTHER ORDERED, ADJUDGED and DECLARED that the defendant World Energy System Associates, Inc. will become liable to Furness Withy (Chartering) Panama, Inc. in the further and additional sum of $15,750.00 (this sum being the amount due to the arbitrators by the defendant WESA, Inc. under the May 14, 1982, award) at such time as Furness Withy (Chartering) Panama, Inc. has paid the arbitrators said sum.

It is FURTHER ORDERED and ADJUDGED that Furness Withy (Chartering) Panama, Inc. have and recover of the defendant World Energy Systems Associates, Inc. the further and additional sum of: (a) $342,216.98; plus (b) a sum equal to interest at the rate of 11.5% per annum on the sum of $295,000.00 from December 30, 1982, through the date of entry of this judgment.

It is FURTHER ORDERED and ADJUDGED that Hemmert International Corporation and Texas Chartering, Inc. jointly have and recover of the defendant WESA, Inc. the sum of $962,829.52 (representing principal and interest due on the promissory note dated August 20, 1981, as of April 12, 1984, and an attorneys' fee thereon), and it is FURTHER ORDERED, ADJUDGED and DECLARED that Texas International Corporation and Texas Chartering, Inc. are entitled to recover interest which has accrued on said note since April 12, 1984, through the date of entry of this judgment at the rate provided for in said note.

It is FURTHER ORDERED and ADJUDGED that Hemmert International Corporation and Texas Chartering, Inc. jointly have and recover of Furness Withy (Chartering) Panama, Inc. the sum of $603,732.26 plus interest thereon from September 15, 1981, through the date of entry of this judgment at the rate of 14.15% per annum.

It is FURTHER ORDERED and ADJUDGED that all other claims in this action are DISMISSED WITH PREJUDICE on the merits.

Hemmert International Corporation and Texas Chartering, Inc. are entitled to recover of Furness Withy (Chartering) Panama, Inc. ¾ths of their taxable costs and are entitled to recover of WESA, Inc. ¼th of their taxable costs.

DONE at Mobile, Alabama this 26th day of October, 1984.

/s/ EMMETT R. COX
United States District Judge

APPENDIX H

Rule B. Attachment and Garnishment: Special Provisions

(1) WHEN AVAILABLE; COMPLAINT, AFFIDAVIT, AND PROCESS. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(Added Feb. 28, 1966, eff. July 1, 1966.)

APPENDIX I

Rule B. Attachment and Garnishment: Special Provisions

(1) WHEN AVAILABLE; COMPLAINT, AFFIDAVIT, JUDICIAL AUTHORIZATION, AND PROCESS. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and a process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.